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ARTICLES

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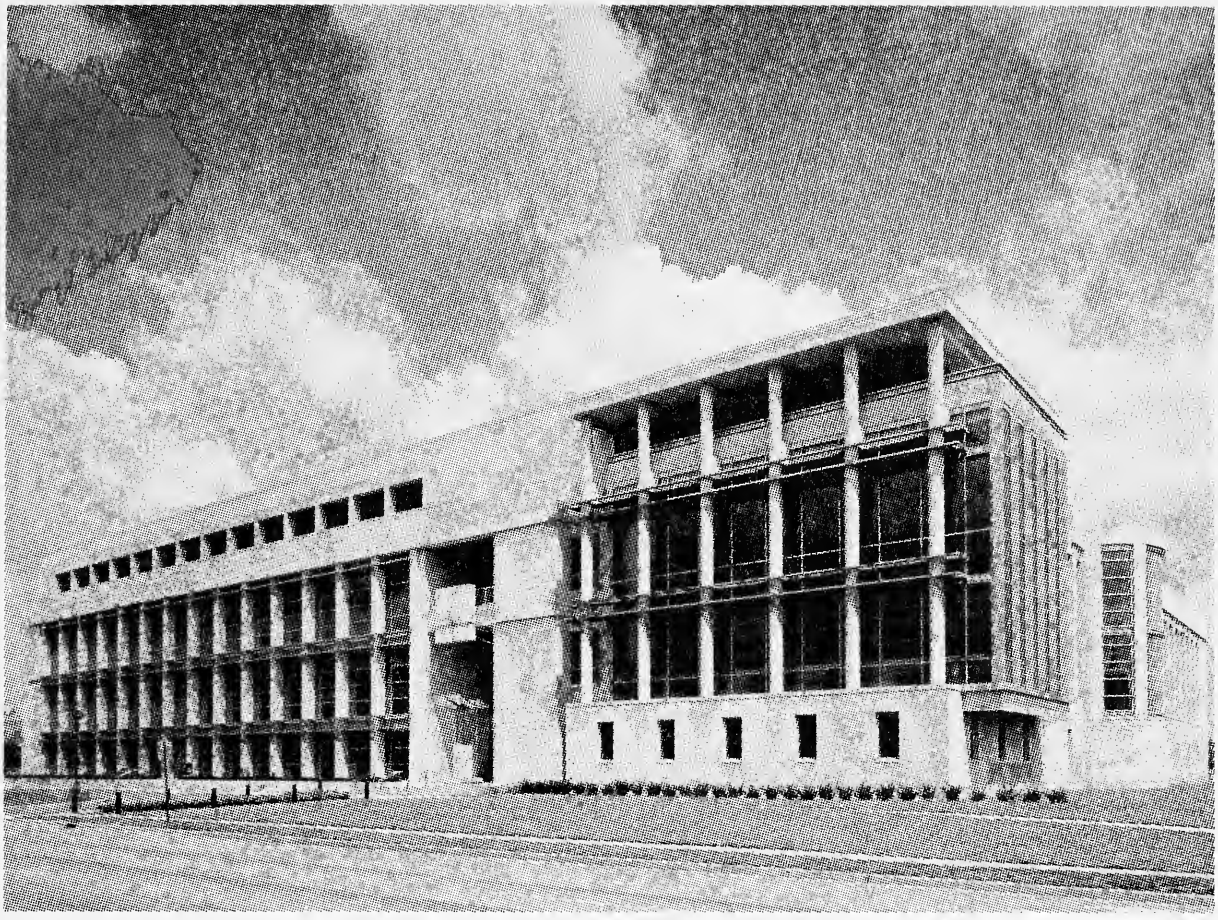

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Indiana Law Review

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ARTICLES

BLAMING THE MIRROR: THE RESTATEMENTS AND THE COMMON LAW*

KRISTEN DAVID ADAMS**

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* MARIE HENRI BEYLE STENDHAL, THE RED AND THE BLACK, ch. XIX, at 375 (C.K. Scott-Moncrieff trans., W.W. Norton & Co. 1926) (1831). The complete quote is as follows:

> A novel is a mirror carried along a high road. At one moment it reflects to your vision the azure skies[,] at another the mire of the puddles at your feet. And the man who carries this mirror in his pack will be accused by you of being immoral! His mirror shews the mire, and you blame the mirror! Rather blame that high road upon which the puddle lies, still more the inspector of roads who allows the water to gather and the puddle to form.

Id. Stendhal's words seem as appropriate for the Restatements as for the novel—we should neither credit nor blame the mirror (the Restatements and the novel, respectively) for the beauty or the flaws in the original (the law and the reality echoed in the novel, respectively).

** Professor and 2004-2006 Leroy Highbaugh, Sr. Chair in Faculty Research, Stetson University College of Law. This Article is the result of more than a decade of research on the Restatement movement, which has fascinated me ever since I began the formal study of law. I gratefully acknowledge the steadfast support of the faculty and administrators of the College of Law for the extensive study that this research has required. My research was underwritten with a generous grant from the College and was presented to the faculty of the Mercer University Walter F. George School of Law and at the annual meeting of the Southeastern Association of Law Schools. I also greatly appreciate the encouragement of the Honorable Guido Calabresi, Dean Emeritus Anthony Kronman, Professors Robert Ellickson and Owen Fiss, who were supportive of my research during my studies at the Yale Law School. I also appreciate the interest of President Michael Traynor and Director Lance Liebman of the American Law Institute in this work and the comments of Professors Deborah DeMott, N.E.H. Hull, Patrick Kelley, Andrew Kull, Mark Movsesian, and Dean Symeon Symeonides on an earlier draft of this Article. Thank you very much to Michelle Renee Maslowski and the staff of the *Indiana Law Review* for their fine editorial work.

INTRODUCTION

Criticism of the American Law Institute[1] and the Restatement movement is a common phenomenon and comes from two sides. The critique from one side is that the Restatements are too activist, stating the law as the Institute believes it should be, rather than the law as it is.[2] The critique from the other side is that the Institute is too conservative—frozen in time in the late 1800s or early 1900s—and fails to incorporate the best contemporary practices in the study of law.[3] This Article focuses on the latter criticism.

The Institute has outlasted the heyday of Formalism[4] and has weathered (and continues to weather) the storms of Legal Realism,[5] Law & Economics,[6] and Critical Legal Studies.[7] This Article addresses the extent to which the Institute has, or even should have, allowed these theories to influence the Restatements. There is a potential downside to attempting to incorporate the divergent theories of each school of thought: the product thus produced could end up being so homogenized and uncontroversial that it would accomplish little.[8]

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1. In this Article, the American Law Institute is also sometimes referred to as "The Institute" and "ALI."

2. For an analysis of the various concerns courts and scholars have raised with regard to the use of the Restatements, see Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 434-43 (2004). The Article also proposes a reasoned and purposeful means of applying the Restatements in a manner that is consonant with the natural development of the common law. *Id.* at 445-50.

3. *See infra* Part II.A. This criticism brings to mind the words of Herbert Wechsler, who suggested that it is appropriate for the Institute to recognize changes in the law and the world, just as a common-law court would. Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 149 (1969). He goes on to note that the common-law court system calls for a respectful balance between precedent and change. *Id.*

4. *See infra* Part II.B.

5. *See infra* note 21.

6. *See infra* note 22.

7. *See infra* note 23.

8. *See* Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 632 (1998). The author quotes a study of the Chicago Bar in a way that seems equally applicable to the Institute:

This Article begins by analyzing six recurring themes in the literature critiquing the Restatements. As this Section will show, the American Law Institute faces steady criticism regarding its membership,[9] its mission and goals,[10] its perceived insularity,[11] its conservatism in the face of proposed reform,[12] its philosophy of law, and its level of utility as a resource for practitioners and judges.[13]

Next, the Article presents three different perspectives on the Restatement movement. First is the common conception that the Restatements are a veritable formalist anachronism that have failed to countenance the important developments in jurisprudence over the last century.[14] Second is the viewpoint that the Restatements are actually more progressive than many have assumed.[15] Last is the intermediate argument that the Restatements represent an effective, albeit purposefully conservative, reform movement.[16]

The Article closes with the suggestion that many of the criticisms of the Restatement movement should be more accurately presented as critiques of the common-law court system.[17] This final section suggests that, although it is fair and constructive to critique the Restatements and the American Law Institute for characteristics that are unique to the Institute's product—especially those that might tend to interrupt the natural common-law-making process[18]—it is neither fair nor constructive to criticize the Institute or its products for traits that are endemic to the common-law courts whose opinions form the basis of the Institute's work.[19]

> There are too many groups within the profession that have too many conflicts with too many other groups—conflicts that are deep-seated and not subject to compromise. Any action of the association that would be likely to be regarded as "decisive" or "progressive" is also likely to offend one or more of these major factions. . . . Herein lies the dilemma of every professional association. The more its membership reflects the diversity of the larger society, the more limited and non-controversial will tend to be the set of goals, however important they may be, that it can effectively pursue.

Id. (citation omitted).

9. *See infra* Part I.A.
10. *See infra* Part I.B.
11. *See infra* Part I.C.
12. *See infra* Part I.D.
13. *See infra* Part I.E-F.
14. *See infra* Part II.A.
15. *See infra* Part II.B.
16. *See infra* Part II.C.
17. *See infra* notes 329-50 and accompanying text.
18. *See* Adams, *supra* note 2, at 445-50 (examining the way in which use of the Restatements may distort a jurisdiction's natural law-making process).
19. *See infra* notes 334-55 and accompanying text.

I. COMMON THREADS IN SCHOLARSHIP CRITICIZING THE RESTATEMENT MOVEMENT

As an initial note, criticizing the Restatements as a Formalist[20] project that has failed to incorporate Legal Realism,[21] Law & Economics,[22] and Critical Legal

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20. Some initial definitions may be useful. Classicism, or Formalism, is the view of law as a science and a discrete specialty. It has been criticized as "Mechanical Jurisprudence" to be distinguished from Sociological Jurisprudence, a forerunner of Legal Realism. *See generally* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911). The writing of Formalist Simeon Baldwin provides a good example of the genre. Baldwin describes law as "both Science and Art—a philosophy and a trade[,]" and demonstrates his confidence in the discrete, logical nature of the law. Simeon E. Baldwin, *The Study of Elementary Law, the Proper Beginning of a Legal Education*, 13 YALE L.J. 1, 2 (1903). In describing the function of cases and the role of lawyers, Baldwin quotes attorney Edward J. Phelps:

> [C]ases do not make principles: they only illustrate them; and that the well trained student has a higher learning than they can furnish. "He does not . . . need to wade through hundreds of volumes of books to see whether a particular point has been somewhere or other decided. He knows how it was decided, if it ever was, and how it *ought* to be decided if it never was."

Id. at 9 (citation omitted). In commenting on the law student's task in learning the aforementioned principles, Baldwin states, "Fortunately . . . these underlying propositions or principles are neither numerous nor obscure." *Id.* at 10. For an argument that Formalism cannot appropriately be viewed as an obsolete philosophy, especially in the area of contract law, see generally Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).

21. Legal Realism is law defined as "[t]he prophecies of what the courts will do in fact." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), *reprinted in* AMERICAN LEGAL REALISM 17 (William W. Fisher et al. eds., 1993) [hereinafter Holmes, *The Path of the Law*]. "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." *Id.* at 15. Realism is also famously associated with Justice Oliver Wendell Holmes's statement, "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881), *reprinted in* AMERICAN LEGAL REALISM (William W. Fisher et al. eds., 1993) [hereinafter HOLMES, THE COMMON LAW]. Holmes goes on to say, "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." *Id.* Holmes also exhorts that lawyers should seek social—not just logical—justification for rules, stating,

> I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.

Holmes, *The Path of the Law*, *supra*, at 21.

John Henry Schlegel lists what he characterizes as the four claims of Realism: "that the rules [are] simply incoherent, . . . that justification [is] inappropriate to scientific inquiry, . . . [that] the process by which the rules were created [is not coherent], . . . [and] that the rules [are] simply

Studies[23] involves making the same recurring criticisms.[24] As this section shows,

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wrong." John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 405 (1984). Another author states, "The Realist methodology was characterized by three tenets: an emphasis on study of the evolution of legal doctrine, a critical approach to use of formalistic reasoning, and a firm commitment to progressive law reform grounded in social scientific research." Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1671 (1982).

Realism is sometimes said to have been defined by the exchange between Roscoe Pound and Karl Llewellyn. AMERICAN LEGAL REALISM 49 (William W. Fisher et al. eds., 1993) [hereinafter AMERICAN LEGAL REALISM] (noting that Llewellyn was later called the chief Realist).

22. Law & Economics scholars describe rule-making as ultimately (and appropriately) market-driven, with legal rules as a price structure. John R. Brock, *Economics and Legal Studies* 2 U.S. A.F. ACAD. J. LEGAL STUD. 203, 209 (1991) ("Economists tend to view legal rules as a set of implicit prices that motivate people to act in particular ways."). Brock goes on to state, "Ultimately, good law must be good economics . . . ." *Id.* at 214.

23. One definition of Critical theory is that it challenges the assumption of the dominance of the rule of law. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462-63 (1987). Stated another way, the Critical Legal Studies movement began by pointing out the incoherence of a system of law assuming an equality that was so clearly not there. E. Dana Neacsu, *CLS Stands for Critical Legal Studies, if Anyone Remembers*, 8 J.L. & POL'Y 415, 421 (2000) ("CLS was born out of frustration with, and in an effort to expose, the contradictions and incoherence of both liberal and conservative legal theories."). Even these definitions are controversial; in fact, even key Critical scholars have declined to define the movement. *See* RICHARD W. BAUMAN, CRITICAL LEGAL STUDIES: A GUIDE TO LITERATURE 3 (1996). Consequently, there are no orthodox Critical views and no Critical texts that adherents commonly recognize as being authoritative. *Id.* at 1.

24. Note that Law & Economics and Critical theory trace their roots back to Realism. The similarities between Critical Legal Studies and Realism are readily apparent. Schlegel, *supra* note 21, at 407-08 ("[T]he drawing of parallels between these two intellectual movements separated by nearly fifty years may . . . be appropriate, perhaps even illuminating, because of a shared, relatively left politics, practiced in a relatively conservative social and political environment."). *Id.* at 407. Schlegel goes on to explain this statement:

> First, while the politics of most of the CLS group is much left of Realist politics, it, like Realist politics, is threatening to the dominant elements in legal education less because of its absolute position on the political spectrum than because it is left relative to those dominant elements; left is destabilizing. More important, however, just like Realism, CLS has as one of its central goals the dejustification of legal rules. Indeed, the movement uses essentially the same techniques; claims of incoherence or inappropriateness abound, as do examples of demythologizing (i.e., debunking or trashing) judicial decisionmaking (and everything else), and direct denials of the correctness of policy.

Id. (enumerating the differences between the two); *see also* BAUMAN, *supra* note 23, at 3 (enumerating similarities between the two). Richard Bauman goes on to note that Critical theory is different from Realism in that Critical theory rejects the proposition that social science can

these criticisms often center on the membership of the Institute, the scope and goals of Institute projects, the perception that the Restatements have not incorporated the knowledge of other disciplines, the widespread conception that the Institute is anti-reform, and the view that the Restatements represent antiquated Formalist thought that is not useful to modern lawyers.

A. Criticism of the Institute's Membership

The Institute has been criticized as being dominated by conservative forces and as failing to be inclusive.[25] Along the same lines, the Institute has been criticized for ostensibly allowing its reporters to become too powerful and for excluding rule-skeptics who might have been critical of the Institute's mission and projects.[26] Judge Richard A. Posner has criticized the American Law Institute for a lack of generational diversity on its elite Council,[27] as well as a lack of intellectual diversity in its general membership.[28] He provides specific

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provide viable answers and is not reformist in the same moderate way. Instead, the Critical movement is generally considered to be more radical. *Id.* at 4; *see also* AMERICAN LEGAL REALISM, *supra* note 21, at xiv (suggesting that Law & Economics and Critical Legal Studies both can trace their roots to Realism).

Some have gone a little bit further, suggesting that Critical theory is actually a continuation of the Realist program. Note, *supra* note 21, at 1669 ("These [Critical] scholars locate the genesis of today's crisis in the Realist legacy and see their task as the continuation of an abandoned Realist project.").

25. Elson, *supra* note 8, at 625-26 (describing criticisms of the Institute as elitist, as lacking the perspective of nonlawyers and interdisciplinary legal scholars, and as lacking intellectual and generational diversity).

26. Alan Milner, *Restatement: The Failure of a Legal Experiment*, 20 U. PITT. L. REV. 795, 797-98 (1959) (Although the Institute claims that its review process ensured that "the peculiar slants were minimized[,]" the author asserts that "[a]ctual practice . . . [falls] somewhat short of this ideal."). Milner continues, "The introduction of 'sceptics' into these gatherings was . . . jealously guarded against. And for obvious reasons—because the sceptics, whose scepticism was directed primarily *against rules*, could not espouse the cause of Restatement without academic hypocrisy, and so their usefulness would be cut down accordingly." *Id.* at 798 (emphasis in original). The author's comments raise the question of whether admitting skeptics into the Restatement process could actually improve the product, echoing the points raised in Part II.C. Milner also refers to Judge Charles Clark for the proposition that, in the Judge's experience, "not once was a Reporter defeated on any issue if he persisted in his views long enough." *Id.* Instead, Milner's critique continues, Reporters employ "careful 'forgetting' of criticisms when reports [are] made[.]" *Id.*

27. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 307 (1999) ("[T]he Institute should consider putting a term limit on membership in the Council.").

28. *Id.* at 305. He recommends that at least some nonlawyers be chosen as members, stating,

> Some of the greatest experts on matters under consideration by the Institute at this time, such as trust investment, products liability, the apportionment of tort liability, and family dissolution, happen not to be lawyers, law professors, or judges; they happen to be economists, finance theorists, psychologists, and sociologists. Some of these people

examples of lost opportunities he believes this lack of diversity has created. Judge Posner is particularly critical of the Institute for failing to embrace interdisciplinary scholarship and failing to include scholars outside the field of law. He asserts that "[t]he most exciting legal research of the past thirty years has been interdisciplinary," then adds that "[e]ven the interdisciplinary *lawyers* are barely represented either on the Council of the Institute, or in the ranks of the reporters and advisors of the Institute's various projects, or in the references in the reporters' notes."[29]

Judge Posner sees this omission as having a considerable impact on the quality of the Institute's work:

> The current family-dissolution draft is centrally about the economics of human capital, on which there is a huge literature not cited in the reporters' notes though in fact well known to the reporter (Ira Ellman). The corporate-governance project suffered not only because of the opposition of business groups but also because the authors did not give due weight to the challenge posed to conventional legal thinking about corporate governance by modern finance theory, as expounded for example by Frank Easterbrook and Daniel Fischel. . . . The truncation of the Institute's Enterprise Liability Project, which had engaged contemporary economic thinking on products liability, bespeaks a lack of receptivity on the part of the Institute to modern interdisciplinary scholarship.[30]

This criticism is not limited in origin to Posner and others associated with Law & Economics. It also includes members of the Realist movement who made it a priority to introduce nonlawyers into law faculties.[31] Justice Abrahamson provides a different perspective that calls the validity of this criticism into question, noting that the reporters consult "a committee of advisers, (not all of whom are ALI members or lawyers)."[32]

> actually teach at law schools, some on a full-time basis. Some would be interested in the work of the Institute. They could give that work an empirical dimension that it now lacks and that . . . legal research sorely needs more of.

Id. at 307.

Judge Paul A. Simmons has made a similar criticism, alleging that the Restatements are tailored to a particular philosophical bent. Paul A. Simmons, *Government by an Unaccountable Private Non Profit Corporation*, 10 N.Y.L. SCH. J. HUM. RTS. 67, 77 (1992) ("In order to reshape the common law into the desired philosophical image of the ALI, the proper choice of reporter for each ALI project is absolutely required.").

29. POSNER, *supra* note 27, at 304 (emphasis in original).

30. *Id.* at 304-05.

31. AMERICAN LEGAL REALISM, *supra* note 21, at 234 (describing, as part of the Realist movement, the introduction of social scientists and others, some with no training in law, to law-school faculties).

32. Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute—The Fairchild Lecture*, 1995 WIS. L. REV. 1, 15. She also notes the involvement of

Judge Paul A. Simmons expresses his concern about the cooption of the judiciary into the American Law Institute.[33] He also expresses his perception that the Institute is still dominated by Harvard and Yale,[34] does not ensure that minority viewpoints are adequately presented,[35] and fails to represent the states equally.[36] Contrasting with the portrayal of the Institute as insular and elitist are the Institute's outreach efforts, such as Arthur Corbin's plea for all attorneys with relevant expertise to lend their knowledge to the Restatement endeavor.[37] Furthermore, there is at least some evidence that the Institute founders believed they had assembled a representative group of lawyers, professors, and judges to

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a consultative group that consists of Institute members who are interested in the project. *Id.* Elsewhere, Justice Abrahamson acknowledges the critique some have levied against the Institute for declining to include nonlawyers as members. *Id.* at 33. She states that "[s]ome have alleged that a bias exists in the ALI because the only interests and perspectives reflected are those of the legal profession, which may tend to favor use of the litigation system." *Id.*

33. Simmons, *supra* note 28, at 70 ("The original incorporators of the ALI have ingeniously and unilaterally compromised both the state and the federal judicial system by incorporating the entire leadership personnel into the participating memberships [sic] activities of the ALI by gratuitously conferring automatic voting and participating memberships on virtually every important judicial leader in the entire judiciary system of the United States."). Judge Simmons finds it particularly troubling that "[t]his was done without obtaining any official consent or permission from any branch of any state or federal government, and without obtaining the prior consent of any of the affected judicial officials." *Id.*

34. *Id.* at 83 ("An unspoken requirement of the ALI membership process seems to be that a potential member, in order to be elected, should be a graduate of Harvard or Yale Law School."). *See also* AMERICAN LEGAL REALISM, *supra* note 21, at 272 ("Harvard, under the direction of Roscoe Pound, had become [by 1928] thoroughly involved in the Restatements of the American Law Institute.").

35. Simmons, *supra* note 28, at 67 (describing the American Law Institute as failing to give "any meaningful consideration of any kind to the social, economic, and political interests of the various minority groups in this country"). Elsewhere, he states,

> There are no members of the ALI Council who would have the natural proclivity to protect the social and economic interests of the middle class, the blue collar working class, or the ethnic minorities, with the possible exception of the four ALI Council members who are lawyers in very small firms with fewer than twenty five partners and associates.

Id. at 89.

36. *Id.* at 88 ("Statistics of the residential distribution of the ALI Council members indicate that twenty six states do not have any resident ALI Council members."). It appears to be Judge Simmons' assumption that the Council should function like Congress, with state-by-state representation. He states, "Thus, millions of people who do not have any ALI Council members from their state are unrepresented." *Id.*

37. Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 24 (1929) ("[E]very person having special knowledge in any field of law is in duty bound to make a careful study of the documents that are being prepared in his field and to send to the Institute all the criticisms and suggestions that he thinks to be of importance.").

commence the Restatement project.[38] Herbert Goodrich describes the distinguished membership of the Institute as a matter in which it may appropriately take pride.[39] Judge Posner has expressed a different opinion, criticizing the American Law Institute as not being elite enough in modern times.[40] One way to test these critiques and others would be to engage in the kind of research proposed by Herbert Kritzer, who has suggested a comprehensive study of the "mission, membership, and . . . process" of the Institute.[41]

B. Criticism of the Institute's Goals and Vision

Related to the critique of the Institute's membership is the criticism that, in typical Formalist fashion, the American Law Institute has not been the force for social justice that it could and should have been.[42] Stated differently, some claim that the Restatements have lost the sense of purpose and spirit of progressiveness with which the project was begun.[43] Some scholars associate this evolution with

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38. THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 41 (ALI 1973) [hereinafter AMERICAN LAW INSTITUTE] ("[W]e determined to make the gathering to which our Report [recommending the founding of the Institute] should be submitted representative of the legal profession in the United States in the sense that each of those invited should be a leader of the profession of the law either by reason of official position or of well established professional standing.").

39. Herbert F. Goodrich, *What Would Law Teachers Like to See the Institute Do?*, 8 AM. L. SCH. REV. 494, 497 (1936). The author states, "A list of prominent names as window dressing for an enterprise is too well known an American phenomenon to excite comment or surprise. But a collection of standing who will interest themselves in the technical side of the work is something new, and the Institute has accomplished it." *Id.*

40. POSNER, *supra* note 27, at 305 ("[I]n sharp contrast to the experience in the first half century of the Institute, few of the reporters for its projects are drawn any more from the leading law schools."). Posner goes on to state, "[T]he diminished representation of the most prestigious law schools in the Institute's work has contributed to the sense that the Institute has lost its former centrality in the process of legal modernization." *Id.*

41. Herbert M. Kritzer, *Evaluating the American Law Institute: Research Issues and Prospects*, 23 LAW & SOC. INQUIRY 667, 671 (1998). This article is a recommendation by political scientist Kritzer for a comprehensive study of the "characteristics and attitudes of the membership," the "representativeness or unrepresentativeness of the institute membership," and the ways in which the Restatements are used, together with a cross-check with social-science scholars regarding the substantive quality of the product insofar as it reflects the knowledge of other disciplines. *Id.* at 670. Kritzer's proposal is in response to the issues raised by Professor Elson. *Id.* at 667; *see generally* Elson, *supra* note 8.

42. Goodrich, *supra* note 39, at 508 (incorporating the symposium comments of Hessel Yntema, who stated that "[i]t would be an excellent thing if the American Law Institute could, through the Restatement of the Law, educate the bird of justice to try to fly forward once in a while"). For explanation of Yntema's reference to "the bird of justice," see *infra* note 245.

43. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE 256 (1995). Much of Schlegel's criticism speaks more generally to the modern state of legal

the Institute's decision, particularly in the first series of the Restatements, to limit the project's purview to existing law.[44] Some of these scholars had read the founding report of the Institute as promising greater reform and were very disappointed by this turn of events. Hessel Yntema describes this as an "indefensible retreat"[45] and "a material nullification of the major objective of the Institute."[46]

Professor William La Piana makes the same point about the Institute's choice of mission when he elucidates the difference between "social justice" and "legal justice," using the lexicon of Pound's sociological jurisprudence.[47] Similarly, Judge Posner has criticized the American Law Institute as staying out of the central, "institutional rather than doctrinal," issues of law reform.[48] Posner sees this as a lost opportunity for the Institute to maintain its reputation of leading the legal profession.[49] Henry Hart and Albert Sacks go a bit further in their

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scholarship:

> Scholarship in the high-Germanic mode of Wigmore and Williston, scholarship whose purpose is the patient organization and classification of the rules, is dead. We do still restate the law and write treatises, but somehow those activities are different than they were eighty years ago. The American Law Institute is a club with its own rules and sells its own sense of having arrived; treatises are a by-product of something else—the need for cash to put children in private schools, the existence of the material sitting there anyway, the demand of the profession for easy, reasonably accurate access to the rules in specialized fields. The norm of scholarship has shifted and the identity of the law professor as well.

Id.

44. *See infra* note 58.

45. Goodrich, *supra* note 39, at 507 (incorporating the symposium comments of Yntema, who also stated, "[T]he notion of improving the law by restating it as it is [sic] unsatisfactory").

46. AMERICAN LEGAL REALISM, *supra* note 21, at 52; Goodrich, *supra* note 39, at 505 ("The initial plan contemplated an ideal statement of law, analytical, critical, and constructive, embodying whatever improvements in the law itself might be recommended by exhaustive study.").

47. William P. La Piana, *A Task of No Common Magnitude: The Founding of the American Law Institute*, 11 NOVA L. REV. 1085, 1102 (1987). "[T]he sociological jurist criticizes legal systems, doctrines, and institutions 'with respect to their relation to social conditions and social progress.'" *Id.* at 1103 (citation omitted).

48. POSNER, *supra* note 27, at 305 (describing the traditional, "doctrinal" work of the Institute). Posner acknowledges that the increasingly political nature of American law, coupled with the Institute's desire to stay out of politics, has made it difficult for the Institute to address the central contemporary issues. *Id.* at 307. "Whatever its causes, the politicization of important areas of American law has made it difficult for the Institute to engage with the most important questions without crossing the line that separates technical law reform from politics." *Id.*

49. Posner states,

> Occasionally the Institute engages institutional issues, as in its work on complex litigation. But for the most part it has been content to remain in the groove first planed in the 1920s—preparing [R]estatements, now most often subsequent editions of the original [R]estatements, of common law fields. This is valuable work. But with the

characterization of the Institute's decision that the Restatements should state only "existing law,"[50] rather than introducing new ideas as to what the law should be. As they state, "[T]hus, the Institute limited itself to the role only of a follower in the statement of the law and of a follower, moreover, willing to join the parade only after it was well under way."[51] Their description has in many instances borne true: although the Institute sometimes has recommended the adoption of a minority rule, even this has been, historically, a relatively infrequent occurrence.[52]

> principal exception of tort law, the doctrines of the common law are on the periphery of contemporary worries about the law—and that seems a strange place in which to concentrate the resources of an organization of the leaders of the profession.

Id. at 306.

50. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 737 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). As the authors note, there was some sentiment to the contrary. The authors include this revealing quote from reporter Joseph Beale:

> If we are to settle and to clarify the law, to adapt it to the needs of life, can we avoid making our statement as to what we think the law is; basing it, unfortunately, not on precedent, because precedent does not decide it, but on the other elements which the President [Benjamin Cardozo] has so happily described as entering into the judicial function, analogy, the needs of society, economic, social, ethical, taking advantage of all the experience and judgment on these matters with which the Lord endowed us at birth, and our experience in life has given us, should we make an effort to state what we think is the sound rule?

Id.

51. *Id.* at 740. The authors clarified elsewhere: "This did not mean that it [the American Law Institute] would not espouse a minority view. The Institute never descended to counting noses and stating only the weight of greater authority." *Id.* at 739. They did, however, suggest that this conservative approach led to a missed opportunity for the Restatements to have greater influence:

> For judges who were interested not only in the negative question of when a court is warranted in overruling or qualifying old precedents . . . without awaiting action by the legislature, the [R]estatements, literally taken, provided exactly no help at all. For they purported to say only what the law "was" in situations in which a substantial number of courts had already broken the new ground. As to when a lead should be taken in breaking ground, they had nothing . . . but neutral "caveats."

Id. at 744. The courts face the same dilemma in deciding how activist they may be without losing credibility and authority. *See infra* Part IV.

The Institute's own conservative view of its proper role is consistent with the words of Herbert Goodrich, who stated that the Institute "should neither promote nor obstruct political, social, and economic changes." HERBERT GOODRICH, THE STORY OF THE ALI 285 (1951).

52. Warren A. Seavey, *The Restatement, Second, and Stare Decisis*, 48 A.B.A. J. 317, 318 (1962) ("[T]he statements were usually in agreement with the rules in a very large percentage of the states, a survey showing something like ninety per cent [sic] agreement with decided cases on contested points . . . ."). Elsewhere, Seavey notes the concern that the product must remain "a statement of the prevailing American law and not a professional dream." *Id.*

Criticisms like these tend to perpetuate the Institute's Formalist image. In contrast, scholars associated with the Critical Legal Studies movement are identified with an almost inherent, left-leaning sense of the centrality of social justice,[53] which has been dubbed as being "politically dissident."[54] Realists, likewise, are often politically liberal[55] and are frequently characterized by an emphasis on the social purpose of law.[56]

Despite these characterizations of the ALI's work as conservative and generally uncontroversial, Justice Shirley Abrahamson reminds us that the Institute's history has not always been free of controversy.[57] The Institute founders also articulated a reasoned basis for the Institute's decision not to address matters of great disagreement.[58] Modern Institute President Michael Traynor has affirmed this judgment in describing the way in which he believes Institute resources might most effectively be used.[59] In addition, it is important

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53. Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1535 (1991) ("A fair number of the first group associated with [CLS] were 'red-diaper babies,' the children of leftist activists in the 1930's and thereafter.").

54. BAUMAN, *supra* note 23, at 3.

55. AMERICAN LEGAL REALISM, *supra* note 21, at 52 (noting the leftist orientation of most Realists).

56. *Id.* at 167 (describing what the Realists called "purposive adjudication" as requiring that "[f]or guidance in decision-making, . . . courts . . . depend primarily on consciously articulated social policies"); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), *reprinted in* AMERICAN LEGAL REALISM 212, 218 (William W. Fisher et al. eds., 1993) (describing an ideal state of law in which "'[s]ocial policy' will be comprehended not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent"); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, *in* AMERICAN LEGAL REALISM 68, 72 (William W. Fisher et al. eds., 1993) [hereinafter Llewellyn, *Some Realism*] (describing Realism as being characterized by "[t]he conception of law as a means to social ends and not as an end in itself").

57. Abrahamson, *supra* note 32, at 6 ("In 1975 it was reported that when the CIA and FBI were investigating politically threatening groups, the ALI was on their list of targets.").

58. AMERICAN LAW INSTITUTE, *supra* note 38, at 23 ("Changes in the law which are, or which would, if proposed, become a matter of general public concern and discussion should not be considered, much less set forth, in any [R]estatement of the law such as we have in mind."). The text goes on to specify that this prohibition would bar, for example, the "advocacy of novel social legislation." *Id.* (clarifying that, "[w]hen, however, a social or industrial or any other policy has been embodied in the law, and also has been so far generally accepted as to be no longer a subject of public controversy, then the improvement of the law in relation thereto may not be beyond the province of the [R]estatement"). Along the same lines, the Institute's founding documents expressed conviction that the Institute should not purport to restate areas of law in which "it may not be in the power of the bar by a [R]estatement, however good, to attain desirable results." *Id.* at 46 (noting that "[s]uch a subject is international law").

59. Michael Traynor, The President's Letter, *"That's Debatable": The ALI as a Public Policy Forum Part I*, A.L.I. REP., Winter 2002, *available at* http://www.ali.org/ali/R2402_presltr.htm. Traynor relates a telling story from the 1959 annual meeting:

to note that the Institute has sometimes been criticized when it was perceived as acting too quickly, rather than waiting for the courts to thresh out the issues more thoroughly. Some have argued, for example, that the creation of the Restatement of Conflicts may have been precipitous because the field was too new and unsolidified.[60] Warren Goodrich responds to this sort of argument by noting that the Restatements are most useful when they respond to current problems, not resolved ones.[61]

As the previously noted comments of Hessel Yntema intimated, one point of view is that the Restatement movement began with social justice as part of its agenda, but later abandoned these aspirations in favor of a total focus on increasing the clarity of the black-letter law.[62] To the extent that this is true, it

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> At the conclusion of the discussion [regarding the "roles of judge and jury in capital cases"], a question was raised whether the Institute should also take a position on abolition of the death penalty. Director Goodrich stated that "We have felt that legislative opinion as backed by public opinion is so divided on the subject that we did not think a formal expression by us would help settling the question one way or the other . . . . Let's be practical. You know what will happen if we start the debate on this subject. We never will get through with it, and we cannot do the other things which we have to do. And at the end, everybody will be of the same opinion as he was when we started out.

Id. at 7. Traynor continues, describing the areas in which he believes the Institute can make an appreciable difference:

> A precious resource of the Institute is its ability to apply deliberative processes to the central object of clarifying and simplifying the law and adapting it to social needs. Even on an issue as provocative as the death penalty was over 40 years ago and still is, the Institute could usefully debate the important legal and policy issue of the function of judge and jury without having to tackle the divisive question of abolition.

Id.

60. For an interesting and comprehensive discussion of this project, see Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad as Its Reputation?*, 32 S. ILL. U. L.J. (forthcoming 2007).

61. Herbert F. Goodrich, *Institute Bards and Yale Reviewers*, 84 U. PA. L. REV. 449, 455 (1936) ("The Restatement should not be an epitaph for a life that has run its course, but a practical help in the solution of current problems."). Goodrich goes on to acknowledge that the passage of time may ultimately produce a superior product. "If we now see as in a glass darkly, the results of our partial vision can at least be set down for the benefit of others. If subsequently another generation writes a superior Restatement, so much the better." *Id.*

62. LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960, at 14 (1986). Kalman describes the inception of the movement in 1923, and the way it has changed since that time:

> The [I]nstitute directed its reporters to "make certain much that is now uncertain and to simplify unnecessary complexities" and "to promote those changes which will tend better to adapt the laws to the needs of life." As work progressed, the [I]nstitute abandoned the second objective, telling its reporters to "state clearly and precisely in the light of the decisions the principles and rules" of existing law. Increasing legal certainty became the [I]nstitute's only objective, a goal underlined by its decision to print the

may represent a purposeful decision on the part of Institute founders to allow the legislatures to take the lead in lawmaking, as Institute leaders understood the democratic form of government to function best.[63] Or perhaps the shift was a societal one, rather than something that took place internally within the Institute.[64]

Another viewpoint is that the Restatements actually do serve as a force for social justice by making it possible for judges to see more clearly when an old law should be changed or abandoned.[65] Similarly, some characterize the Restatement movement as a public service performed out of the bar's sense of civic duty,[66] noting the sense of public-mindedness with which Institute members approach their work.[67] Along these lines, there is at least some evidence that the founders of the Institute believed the project would advance the cause of social justice.[68]

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rules in especially bold black letters.

Id.

63. AMERICAN LAW INSTITUTE, *supra* note 38, at 14 (describing the founders' view of the separation of judicial and legislative functions). The report of the founders' committee stated,

> It is the province of the people and of legislative bodies, through constitutions and statutes, to express the political, economic and social policies of the nation, of its states, and of smaller communities. It is the province of lawyers to suggest, construct and criticize the instruments by which these policies are effectuated. The proposed organization should concern itself with such matters as the form in which public law should be expressed, the details of private law, procedure or the administration of law, and judicial organization. It should not promote or obstruct political, social or economic changes.

Id.

64. AMERICAN LEGAL REALISM, *supra* note 21, at xii (describing a shift in the law, following the Civil War, from focusing on justice to focusing on precedent and formal equality in the application of law).

65. Seavey, *supra* note 52, at 318 ("[I]n many cases [a Restatement] was of aid to the courts in changing a rule, unjust but based upon authority.").

66. George W. Wickersham, *The American Law Institute and the Projected Restatement of the Common Law in America*, 43 L.Q. REV. 449, 449 (1927) ("The American Law Institute . . . was the result of a movement originated at meetings of the Association of American Law Schools out of discussions over the existing dissatisfaction with the law and its administration and a recognition of the growing feeling among the members of the legal profession that the bar owed a duty to the public to improve the administration of justice."). Wickersham was the first president of the American Law Institute.

67. Abrahamson, *supra* note 32, at 4 (quoting Judge Abner Mikva as saying, "ALI reminds us that we are a profession and that, while we hope to do well as lawyers, we also expect to do good . . . ."). The Institute's founding documents reflect a similar view of the public duty of lawyers: "The community may rightly look to the lawyer to promote social peace, good order and well-balanced social progress." AMERICAN LAW INSTITUTE, *supra* note 38, at 58.

68. AMERICAN LAW INSTITUTE, *supra* note 38, at 16 ("[E]veryone realizes that long-drawn-out litigation is, on account of the expense, a greater hardship on those of relatively small means

Yet another perspective is that social reform is beyond the appropriate purview of the Institute.[69] Arthur Corbin suggests that change is more properly seen as falling within the jurisdiction of the common-law courts rather than the American Law Institute.[70] Instead, Corbin suggests, the role of the Institute is not to stand in the way of such change once it has been recognized by the court system.[71] His remarks show, however, that he nevertheless believed that the Restatement position should be considered in the balance even when mores and economic values might suggest a different result.[72]

The Restatements have also been criticized as relying too much on the power of language.[73] This critique, like that of the Institute's mission, is fundamentally

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than on the litigant with a long purse.") The Institute founders believed that their project, by making the law less unnecessarily complex, would reduce the time and expense associated with litigation. *Id.*

69. Fred B. Helms, *The Restatements: Existing Law or Prophecy*, 56 A.B.A. J. 152, 154 (1970) ("[T]he American Law Institute should continue to use its prestigious *Restatements* to state the law recognized by the courts. They should leave predictions of change caused by social policy and economics to the law review and textbook writers."). Helms cautions the reader:

> The adoption by the A.L.I. of this prediction technique has forced the courts to look at law review articles to determine the present majority rule . . . . Instead of giving the courts an authoritative, determinative source with which at least to begin the decision-making process, the *Restatements* are in danger of being treated as merely worthwhile treatises.

Id. at 153 (citation omitted) (emphasis in original).

70. Corbin, *supra* note 37, at 28 ("Before this great community for which the Restatement is being made would be willing to adopt it, its doctrines must have received approval and application in some litigated case."). Corbin elaborates: "So far as new social mores and business practices are concerned, there is no research machinery for their discovery. The present writer believes, however, that if there were such machinery, it would be influential in affecting the Restatement only in very limited fields." *Id.*

71. *Id.* at 36 (asserting that the Restatements should not "in any serious degree operate to limit the development of law in accordance with changing conditions, practices, and mores"). Corbin elaborates: "The [R]estatement by the Institute, if well done, may tend to reduce the amount of ignorant and unintentional variation; it may reduce, but it cannot and should not prevent, that conscious variation that is based upon new experience, changing conditions, and new customs and desires." *Id.* at 27.

72. *Id.* at 39 ("[I]n the discussion and criticism of judicial decisions, and even in the consideration of social mores and economic theories, when the learned instructor reports that some courts hold *this* and some theorists assert *that*, he must now add that the American Law Institute says *the other*."). Elsewhere, Corbin quotes Elihu Root who states, describing what he hoped would be the authority of the Restatement project, "there will be not a conclusive presumption [of the correctness of the Restatement position] but a practical *prima facie* statement upon which, unless it is overturned, judgment may rest." *Id.* at 22.

73. Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367, 1368-69 (1934) ("The assumption of the [Institute] draughtsman, therefore, is that language has social significance, and can be depended

a criticism that the Institute is too conservative in its outlook. The Institute's use of language was a favorite source of condemnation by members of the Realist movement.[74] "Word magic" and "word ritual" were some of the pejorative terms Realists have used to challenge the assumption that words have discrete, unchanging meaning.[75] Somewhat later in the twentieth century, "postmodern" scholars, including those associated with the Critical movement, made similar claims.[76] Incidentally, this problem may be one that is endemic to the English language; George Wickersham has noted the limits of English, as compared to Latin, in expressing concepts of law.[77]

Evidence supports this interpretation of the Restatements' approach to terminology. The ALI's own documents suggest that the Institute founders believed that careful and purposeful use of language could make a substantive difference in the success of their project.[78] As Warren Seavey notes, the goal was to limit a word to only one meaning throughout its use in the Restatements.[79] The Realists, of course, would deny the possibility of this kind of consistency. Further, at least one scholar claims that the Institute has not only failed in its efforts to guard the careful use of language in its Restatements, but also may not have made this goal a priority in the first place.[80]

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upon as an authoritative means of intercommunication.").

74. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 141 (1983) ("Across the Atlantic Wittgenstein was demonstrating the absurdity of attempting to put language in a straitjacket, yet the Restaters pressed on."). This is especially important insofar as one view of the Restatement movement is that it was an attempt to "protect [O]bjectivism from destruction by a new school of legal thought, [R]ealism." Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239, 240 (1979) (characterizing the viewpoint of Grant Gilmore regarding the Restatement movement). Crystal ultimately challenges this assumption. *Id.*

75. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 119-20 (1995) (quoting C.K. Ogden, J.A. Richards, and Charles E. Clark).

76. GARY MINDA, POSTMODERN LEGAL MOVEMENTS 3 (1995) (defining postmodern legal thought); *id.* at 239 ("Postmoderns thus reject the "common sense" understanding of language which associates the meaning of words with fixed objects in the world.").

77. Wickersham, *supra* note 66, at 455 ("The fact is, that the English language does not lend itself readily to exact expression of juridical thought, as does the Latin language and those directly derived from it.").

78. AMERICAN LAW INSTITUTE, *supra* note 38, at 29 (addressing "the importance of expressing the [R]estatement in clear and simple English, avoiding so far as possible, the use of technical and unusual terms[,]" and that "the [R]estatement should be understandable by an intelligent, educated person who is not a trained lawyer.").

79. Seavey, *supra* note 52, at 318 (describing the Restatements' "rules for writing"). The Institute's founding documents are consistent with Seavey's characterization. *See* AMERICAN LAW INSTITUTE, *supra* note 38, at 48 ("[A]n important part of the work of the Institute must be to secure precision in the use of legal terms.").

80. George R. Farnum, *Terminology and the American Law Institute*, 13 B.U. L. REV. 203, 208-09 (1933). The author states that it is "altogether plain that the various reporters and their

C. Criticism of the Institute's Apparent Insularity

Some scholars claim that the Restatements err in reifying the law as its own discipline, even as its own science, rather than incorporating the knowledge of other disciplines.[81] Like the two critiques previously discussed, this one, too, is at its core a criticism that the Institute is old-fashioned and outdated in its goals and methodology. The idea of the "science of law" was a Formalist ideal[82] to which Realism attempted to respond.[83]

Others complain that the Restatement movement reflects a disproven view of the legal profession as having something unique and unbiased to offer. In recent years, Law & Economics scholarship challenged this conception in part through a push for interdisciplinary scholarship.[84] Furthermore, as early as 1923, Realist Walter Cook recommended the inclusion of "real economic experts" in the Restatement project as a necessary precondition for identifying "the best rule."[85] Not long after, Charles E. Clark and Robert Maynard Hutchins criticized the American Law Institute for failing to take such advice and as therefore failing

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advisers have not come to any complete arrangement among themselves as to the consistent use of definite terminology throughout the entire series of subjects being restated." *Id.* at 208. The author goes on to state, "[W]e have it on unimpeachable authority that 'at the start' of the work 'there was no insistence on a uniform legal terminology throughout all of the Restatements.'" *Id.* at 209 (quoting Formal Statements of Director, Proposed Final Draft No. 1—Conflict of Laws p. 26).

81. References to law as a science appear several times in the founding documents of the Institute. *See, e.g.*, AMERICAN LAW INSTITUTE, *supra* note 38, at 44 (describing "the encouragement and conduct of scientific legal work" as a major goal of the Institute); *id.* at 63 (describing the law as one of a number of "applied science[s]").

82. AMERICAN LEGAL REALISM, *supra* note 21, at xii-xiii (noting "the desire of the relatively new cadre of professional law teachers [around the turn of the last century] to persuade skeptical university presidents and practicing lawyers that law was a science, a technical but integrated field that could be mastered only through three years of full-time study").

83. *Id.* at 3-4 (referring to the work of early Realist Holmes and others as being perceived as "a denunciation of all efforts (like those of Harvard Law School's dean, Christopher Columbus Langdell) to represent law as a 'science'").

84. Nicholas S. Zeppos, *Reforming a Private Legislature: The Maturation of the American Law Institute as a Legislative Body*, 23 LAW & SOC. INQUIRY 657, 660 (1998) ("[Law & Economics] scholars fundamentally challenged both the idealized model of interest group pluralism and the legal process assumptions about the legislative process." (internal citations omitted)).

85. SCHLEGEL, *supra* note 43, at 77. Schlegel states,

> [A]fter going through the Institute's plan for generating an authoritative statement of "the 'best' rule" where legal analysis had identified conflicting rules, Cook observed that choosing the best rule would involve in many cases "a knowledge of economic facts which the legal experts will not have." Rather, one would need "the cooperation of real economic experts," people who are "trained in getting at and in interpreting the meaning of the facts relating to our industrial and financial organization."

Id. (footnote omitted).

to do adequate research to support the Restatement project.[86] Lawrence Friedman is more trenchant in his critique, describing the first series of Restatements as "almost virgin of any notion that rules had social or economic consequences."[87] Judge Posner offers a more measured interpretation, noting that the need for interdisciplinary perspectives in the law was not readily apparent until relatively recent times.[88] Posner does, however, point out that "the composition of the Institute . . . is limited to practicing lawyers, judges, and law professors—that is, to lawyers and only lawyers" and, therefore, criticizes the Institute for failing to incorporate interdisciplinary scholarship.[89]

Early Realist Oliver Wendell Holmes was perhaps one of the first to point out the importance of interdisciplinary study in the law.[90] The rise of

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86. *Id.* at 83 ("[A]fter recounting the unsuccessful efforts at procedural reform and detailing contemporary efforts, including those of the American Law Institute, [Clark and Hutchins] concluded: 'The reformers have failed, we believe, because the necessary basic research has been lacking . . . . We regard facts as the prerequisite of reform.'"). Clark and Hutchins believed that the Restatement project should have been "correlated with the study of allied subjects outside the law." *Id.*

87. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 582 (1973). The author further states, "They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones. The bones were arrangements of principles and rules (the black-letter law), followed by a somewhat barren commentary." *Id.*

88. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 763 (1987) (Posner states that, as recently as "1965[,] it reasonably appeared that any deficiencies in the legal system could be rectified by lawyers trained and operating in the tradition of autonomy."). Posner notes, among other factors contributing to the need for interdisciplinary study in law, the decline of "political consensus associated with the 'end of ideology.'" *Id.* at 766 (citation omitted). He also credits the rise of statutes with a decline in the lawyers' monopoly on the proper understanding of law. *Id.* at 773 (noting that "[t]he particular skill honed by legal education and cultivated by legal scholars is that of extracting a legal doctrine from a series of cases and fitting it together with other doctrines similarly derived. It is a particularly valuable skill in dealing with common law," but less necessary in the age of statutory domination).

89. POSNER, *supra* note 27, at 304. Additionally, he states,

> A great deal of the work that [has] practical relevance [to the law] is done by people with law degrees, of course, but not all—think of the work of Ronald Coase, Gary Becker, William Landes, and Steven Shavell, to name only a handful of the distinguished economists who have worked on legal problems and who ought to be well known to everyone seriously interested in law reform.

Id. Similarly, Judge Paul A. Simmons points out, "There are no sociologists, economists, accountants, political scientists, bankers, stockbrokers, insurance executives, corporate chief executive officers, engineers, or penologists represented on the ALI Council, even though ALI publications are of significant social and economic importance." Simmons, *supra* note 28, at 88 (footnotes omitted). Perhaps notably, the same could be said of the judiciary, whose work the American Law Institute purports to assist. *See infra* Part IV.

90. Holmes, *The Path of the Law*, *supra* note 21, at 22. Holmes famously stated, "For the

interdisciplinary study may be associated with Legal Realism and, later, Law & Economics.[91] The need for interdisciplinary scholarship was a common theme in the Realist era, even though at least one scholar admits that, although he is convinced social facts influence judicial decisions, he is not entirely sure how the mechanism functions.[92] Roscoe Pound, likewise, calls for increased interdisciplinary study and decreased legal "monasticism."[93] Alan Milner makes the same point in a slightly different way, suggesting that lawyers should receive training in the behavioral sciences.[94] Law & Economics is overtly interdisciplinary,[95] and the same is true of much contemporary legal scholarship. Yale Professor Robert Ellickson has noted the dominance of interdisciplinary

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rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." *Id.* He was particularly concerned that lawyers understand the value of studying history:

> The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.

Id.

91. Professor Ulen describes a decreased sense of law as being its own discipline, associated with the rise of Law & Economics. Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 436 ("Prior to the advent of [Law & Economics], the study of law did not have a coherent theory of decision-making, largely because it did not need such a theory. Law was an autonomous discipline.").

92. Cohen, *supra* note 56, at 225 ("We are still in the stage of guesswork and accidentally collected information, when it comes to formulating the social forces which mold the course of judicial decision."). The author goes on to enumerate what had been observed, to date, about the workings of these forces. *Id.*

93. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910), *reprinted in* AMERICAN LEGAL REALISM 44 (William W. Fisher et al. eds., 1993) [hereinafter Pound, *Law in Books*] ("Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient. . . . Let us not become legal monks.").

94. Milner, *supra* note 26, at 824 (asserting that "the need is to make [lawyers] familiar with more techniques than merely analytical legal ones"). Milner continues, "For a start, they should be at least [be] passingly familiar with the behavioral sciences, with some idea of the inter-relationship of sociological, psychological, and criminological material to legal concept and problems." *Id.* (footnote omitted).

95. John R. Brock, *Economics and Legal Studies*, 2 U.S. A.F. ACAD. J. LEGAL STUD. 203, 203 (1991) (noting that "virtually every major law school in the United States now has at least one full-time PhD economist as a member of the law faculty"). Brock goes on to characterize economics as the penultimate social science. *Id.* at 214. "There is only one social science. Economics interpenetrates them all, and is reciprocally penetrated by them . . . the same master pattern of social theory—one into which the phenomena studied by the various social sciences to some extent already have been, and ultimately will all be, fitted." *Id.* (quoting Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53, 68 (1985)).

study in recent years.[96] Lawrence Friedman has also commented on the prevalence of interdisciplinary methods in Law & Society literature.[97]

Because interdisciplinary scholarship has become so prevalent, several scholars have tried to identify ways in which the Institute might benefit from this body of work. Professor Herbert Kritzer, a political scientist, suggests that the Institute use scholars from other disciplines to evaluate its handling of the various social issues that the Restatements address.[98] Along the same lines, Hessel Yntema has criticized the Institute for not having gone forward with the empirical factual surveys that were promised in the early days of the Institute.[99]

Both Law & Economics and Realist scholars have pushed for more empirical research.[100] This emphasis is a natural outgrowth of both movements, which are described as being more social-science oriented than traditional doctrinal research is.[101] One scholar has asserted that the reason for the law profession's general resistance to this transformation is that the scientific method is deductive, while traditional case study is inductive.[102] Even so, there is at least some evidence that the Institute founders intended to incorporate empirical study into the Restatement project.[103] This effort was likely abandoned on account of the considerable time and expense involved.[104]

There is also some indication that the leaders of the Restatement movement were familiar with these methodological criticisms early on[105] and may even have

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96. Robert C. Ellickson, *The Twilight of Critical Theory: A Reply to Litowitz*, 15 YALE J. L. & HUMAN. 333, 343 (2003) ("Currently some of [the] hottest topics in the academy are the interrelated issues of trust, social capital, socialization, and norms . . . . The most ambitious work is self-consciously interdisciplinary.").

97. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 763 (1986) ("People who carry on law and society research vary greatly in methods and outlook. What they share is a general commitment to approach law with a vision and with methods that come from outside the discipline itself . . . .").

98. Kritzer, *supra* note 41, at 671 ("The purpose of these reviews would be to ascertain the degree to which the Restatements are consistent or inconsistent with empirical understandings of the phenomena addressed by the Restatements.").

99. Hessel E. Yntema, *What Should the American Law Institute Do?*, 34 MICH. L. REV. 460, 465 (1936) (asserting that, "[f]or reasons which are not entirely apparent, no such endeavor to obtain factual information on vital issues has been made by the Institute as such").

100. Ulen, *supra* note 91, at 436 ("I am confident that [Law & Economics], in conjunction with law and society, will foster the empirical study of legal rules and institutions.").

101. *Id.* at 434 (describing Law & Economics as "a force that transformed many faculty from exclusive practitioners of traditional doctrinal research to a more social-science-oriented research").

102. *Id.* at 446 ("Some commentators have objected to [Law & Economics'] attempt to construct a theory of legal rules and institutions on the ground that law is inherently an inductive discipline, slowly growing from case to case and eschewing grand theories.").

103. AMERICAN LAW INSTITUTE, *supra* note 38, at 56-57 (describing planned "legal surveys" that would illuminate "the practical operation of existing rules of law").

104. *See infra* note 307.

105. Goodrich, *supra* note 39, at 496 ("Certainly we have need of new methods of approach,

taken steps in response.[106] In addition, Institute leader Herbert Wechsler seems to have considered, and ultimately rejected, the conception that science would necessarily enrich the creation of good law.[107]

Some scholars have attempted to divide the study of law into a science of and a science about law—a division which is controversial—in an attempt to demonstrate the value of endeavors like the Restatements as artifacts of a science about law.[108] Others have characterized the description of law as a science as, at least in part, itself an artificial construction intended to protect the professional identity and monopoly of lawyers.[109]

In considering the Institute's chosen methods, it is important to note that it is not universally accepted that Institute members must consider social facts when crafting Restatement principles that promote social justice. Arthur Corbin acknowledges the difficulty inherent in ensuring that the American Law Institute's Restatements are consistent with the fabric of American law and society.[110] He goes on to suggest, however, that "experience indicates that the best way to turn mores into law is to do it piecemeal by the "molecular motion'

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new systems of terminology, liaison with other fields of social science."). Goodrich adds, in defense of the Institute and its methods, "Surely we are still lawyers, even though to be good lawyers we have to pick up something of the other social sciences in our stride." *Id.*

106. Modern Institute President Michael Traynor has urged Institute members to take the advice of former Director Herbert Wechsler, who stated, "We should feel obliged in our deliberations to give due weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs." Traynor, *supra* note 59.

107. Jonathan S. Simon, Wechsler's Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government 6 (2003), *available at* http://repositories.cdlib.org/csls/lss/11 (unpublished manuscript) (describing, in the criminal law context, Wechsler's concern with "the increasing claims of would be professionals to have developed scientific expertise, 'adequate, or nearly adequate, to solve the practical problems of crime control'"). Simon later asserts, "Wechsler felt that law was particularly endangered by the twin pressures of populism and professional hubris (associated with the human sciences)." *Id.* at 7. Instead, Wechsler seems to have embraced the more conservative belief in the law as having something unique to offer as its own discipline.

108. Milner, *supra* note 26, at 810 ("[T]he first would deal purely with the interdependence of rules and deductions from them, the second with putting these rules and deductions into their proper places in the judicial and social processes."). Milner goes on to indicate what he believes to be the futility of such an exercise: "[T]o make this division is to assume that one can syphon the oxygen out of water and still get washed in what is left—to assume that one can exist independently of the other and still perform more or less the same function." *Id.* at 810-11.

109. La Piana, *supra* note 47, at 1089 ("As social structure changed and America became more and more a national society, mastery over a politically neutral body of scientific knowledge became an important way to make one's place in society respectable and secure.").

110. Corbin, *supra* note 37, at 27. Corbin asks, "[I]s the Institute sufficiently taking into account the recent variations already evidenced in court decisions and also the social mores and business practices that are already ripe for new variations that must inevitably take place?" He then responds, "The answer to this is easy; most certainly the answer is No." *Id.*

of the courts."[111] Harlan Stone's viewpoint, similarly, is that so-called sociological jurisprudence is not nearly as novel as some have claimed it to be. Instead, he asserts that judges have always considered the factors urged by the "sociological method."[112] Oliver Wendell Holmes, likewise, has shown that the law captures current judgments about value and priority, even when it does not do so expressly.[113] Thus, it is not clear that it is appropriate to criticize the Institute as neglecting interdisciplinary study and empirical methods, if such study and methods would be duplicative of the best current efforts of common-law courts.

D. Criticism of the Restatements as a Bulwark Against Greater Reform

One view of the Restatement movement is that it was an attempt to protect the common law against codification.[114] Some scholars agree with this view even though they also claim the Restatements ultimately have borne great similarity, in form and in goals,[115] to a code.[116] Roscoe Pound ascribes this resistance to

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111. *Id.* at 28 ("[W]e should remember that new social mores and business practices are in general forced upon the attention of our courts about as soon as they can be described as 'prevailing.'"). Corbin further states, "It is no new or surprising dogma that custom makes law. As fast as custom can safely be turned into law, the courts generally do it; and the Institute will be willing to recognize." *Id.* at 28-29. In responding to the criticism that the American Law Institute moves too slowly, Corbin's response seems to be that "the danger involved in stating unadjudicated mores and practices as existing law would be much greater." *Id.* at 29.

112. Harlan F. Stone, *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319, 328 (1923) ("It is not a novel idea, that in declaring law the judge must envisage the social utility of the rule which he creates. In short, he must know his facts out of which the legal rule is to be extracted and in a large sense they embrace the social and economic data of his time."). Stone continues,

> Many years ago, Mr. Justice Holmes in classic phrase reminded us that "the life of the law is not logic but experience." If this is what is meant by the sociological method and by sociological jurisprudence, it is the method which the wise and competent judge has used from time immemorial in rendering the dynamic decision which makes the law a living force.

Id.

113. Holmes, *The Path of the Law*, *supra* note 21, at 19 ("We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.").

114. Crystal, *supra* note 74, at 239 ("Grant Gilmore and Lawrence Friedman have characterized the Restatement project as a reactionary attempt by the legal establishment to maintain the common law system against the attacks of the legal realists and the threat of codification."). Lawrence Friedman describes the situation: "The proponents [of the Restatements] were hostile to the very thought of codification. They wanted to head it off, and save the common law, by reducing its principles to a simpler but more systematic form. The result would be a Restatement, not a statute." FRIEDMAN, *supra* note 87, at 582.

115. Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351, 371 (1969) ("The philosophy of the Restatements was opposed to the philosophy of codification.

codification to the historical distrust that lawyers and judges have had for legislation.[117] Another related perspective is that the Restatements were intended to be superior to codification because they would preserve the flexibility and dynamism of the common law on which they would be based.[118]

The notion that the Restatements historically have been anti-reform and anti-codification is not universally accepted. Thurman Arnold has argued that the Restatements were intended to present a more conservative solution than codification to the problem of an overwhelming volume of sometimes contradictory case law.[119] Others, including Institute leader William Draper Lewis, were sympathetic to—or at least not opposed to—the idea of codification,

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In fact, the Restatements were supposed to save the common law from the horrors of codification. But the Restatements' goals were strikingly similar to those of the codifiers.").

116. The Institute founders recognized this similarity but strongly recommended that their product not be adopted as a code, at least not in the traditional sense. AMERICAN LAW INSTITUTE, *supra* note 38, at 26. The founders were particularly concerned that the Restatements not lose the dynamism of the common law on which they are based. *Id.* ("The adoption of a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended."). The founders also believed their product would be, in some ways, substantively different from a code. *Id.* at 27 ("The statement of principles should be much more complete than that found in European continental codes."). The founders of the Institute did, however, leave open the possibility that their product would earn what they called "quasi statutory sanction." *Id.* at 30-31 (noting that the result would be that "they shall have the force of principles enunciated as the basis of the decisions of the highest court of the state, the courts having power to declare modifications and exceptions").

117. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909), *reprinted in* AMERICAN LEGAL REALISM 29-30 (William W. Fisher et al. eds., 1993) [hereinafter Pound, *Liberty of Contract*].

118. Samuel Williston, *Written and Unwritten Law*, 17 A.B.A. J. 39, 41 (1931). Williston states, "One of the evils of codification, I think, that may be observed in French and German writing is the tendency to narrow legal thought." *Id.* Williston distinguishes the Restatement project on this basis, stating that the principles thus enunciated "will not be straight-jackets for the law." *Id.* He continues:

> The courts need not accept them unless they like, and it is hardly to be expected that a court of a state where there is a well settled rule on a particular point will throw it over simply because the American Law Institute has laid down a rule at variance. But most of the rules stated in the American Law Institute will not be at variance with the settled rules of the courts.

Id.

119. Thurman W. Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811, 818 (1936) ("A code would have been a way of control [of the rapid inflation of case law], but we were not yet ready for such an amount of governmental interference with private law. The rugged individualism of separate cases, each standing sturdily on its own four legs in a little empire of its own, whose boundaries were fixed by stare decisis and maintained by constant fighting, could not be destroyed without loss of national character.").

even while touting the usefulness of the common law.[120] Still others—both inside and outside the movement—saw the Restatements as a necessary first step toward codification or some other significant reform.[121] Finally, Robert Cooter and Thomas Ulen claim that the Restatements are more similar to civil-law codes than many realize,[122] perhaps even intentionally similar,[123] making the whole debate about whether the American Law Institute was supportive of—or attempted to end—the codification movement somewhat pointless.[124]

Yet another view of the Restatements is that they were meant to transform American law into a treatise-based system similar to Roman law.[125] If this theory is valid, then the Restatements may ultimately support the creation of a legal framework that is distinguishable from either a traditional civil-law or a common-law system. One characteristic of Roman law, which some scholars see reflected in the Restatement movement, is the dominance of the university

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120. Goodrich, *supra* note 39, at 512 (reflecting the comments of William Draper Lewis, who stated, "The common-law method of developing law is bone of our bone, flesh of our flesh, but that does not mean that at some future time there may not be a general code of private law.").

121. *Id.* at 502 (reflecting the symposium comments of Roswell M. Perkins). Mr. Perkins stated, in describing why he thought the current Restatement project was useful and important,

> [W]hen the time comes for us to make a really bold re-examination of the whole legal scheme in the light of sociology, economics, politics, ethics, and the other so-called nonlegal materials, it will be rather useful for us to have the strictly legal materials themselves in as usable form as possible, and such a study [as the current Restatements] would seem to contribute rather largely to that end.

Id. During the same symposium, William Draper Lewis expressed similar sentiments: "[W]e felt . . . that, if we were going on to make any improvements of the law, this Restatement of the existing general common law was an essential preliminary thing to be done." *Id.* at 510.

122. *Id.* at 507 (expressing the views of Hessel Yntema that "the Restatement of the Law has turned out to be a statement of the general principles of the common law, not dissimilar to the European codes"). Yntema goes on to state of the Restatement project, "Its intention is to state the law in authoritative comprehensive terms, and this, give it whatever name you please, is a species of codification." *Id.* at 508.

123. Seavey, *supra* note 52, at 318 ("The original [R]estatement was intended as a code, in the old form, a set of rules stated with little explanation.").

124. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 61 (4th ed. 2004) (asserting that the Restatements "serve similar functions as the codes that are thought to be characteristic of the civil law countries"). The authors go on to state, "Comparative law scholars vigorously debate whether the differences between civil and common law are more apparent than real." *Id.*

125. Max Rheinstein, *Leader Groups in American Law*, 38 U. CHI. L. REV. 687, 692 (1971) (describing the Restatements of the Law as the culmination of the trend toward a "professorial law" system). The author describes this is a natural trend, given the nature of the development of the American legal system. "Because the professors are not only the teachers of the practicing branch of the legal profession but also the guides and advisors, American law, as actually practiced, has begun to assume some of the traits of a professorial law." *Id.* Rheinstein describes "professorial law" as that which tends "toward systematization and occasionally toward creation of concepts of high abstraction." *Id.*

professor in the lawmaking process.[126] The Roman system has been praised for producing a notably seamless jurisprudence because so much is the product of a single author.[127]

As the previous discussion mentioned, some scholars understand the Restatements as being a natural transition to codification.[128] Nathan Crystal, going a step further, describes the Restatements themselves as being a conservative form of codification.[129] Hessel Yntema finds this development ironic, given the Institute founders' supposed opposition to codification.[130] Crystal has challenged this common conception, suggesting that the Restatements were at least not intended to prevent codification and that the Institute might even have been sympathetic to the cause.[131] Consistent with Crystal's assertion, there

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126. Franklin, *supra* note 73, at 1371 ("For the first time in Anglo-American legal history the law teacher holds a position comparable to the civilian law teacher when the latter writes doctrine."). *See also supra* note 28.

127. Stone, *supra* note 112, at 328-29. Stone described the Roman law system:

> The Roman law system created such a [systematic, scientific] device through the writings of the jurists who subjected its doctrines to critical examination and whose influence was in the direction of systematic organization and development. Through imperial decree the writings of [scholars] Papinian, of Paulus, of Gaius, of Ulpian, and Modestinus and their collaborators, already possessed of the authority of their merit, were given the authority of law, of greater weight in fact than the pronouncements of the courts. The result was the excellence in form and systematic development of the Roman law . . . .

Id.

128. Franklin, *supra* note 73, at 1373 ("The function of the Institute is to liquidate the English reception with its judge monopoly, and to clear the way for codification resting upon a formal base of legislation.").

129. Crystal, *supra* note 74, at 265 ("The Restatement project, begun in 1923 by the ALI, represents a continuation and modification of the late nineteenth century codification movement."). Crystal asserts,

> This link is shown in two ways. First, the sponsorship of the Restatements came from professional law teachers and elite lawyers associated with the ABA, the same groups which were the principal sponsors of codification. Second, the goals and fundamental ideas of the advocates of the Restatement project were substantially the same as those of the late nineteenth-century codifiers.

Id.

130. Yntema, *supra* note 99, at 468-69 (characterizing as "unsatisfactory" the statements against codification in the original report of the founders). Yntema notes that the founders urged the common law as being superior to a code due to the flexibility, precision, and detail that, they stated, the common law would provide. *Id.* Yntema goes on to state, "[T]his is a strange concatenation of ideas, which appears the more extraordinary now that the Restatement of the Law has turned out to be a statement of the general principles of the common law, not dissimilar to the European codes." *Id.* at 469.

131. Crystal, *supra* note 74, at 239 ("[T]he Restatement movement was, in fact, sympathetic to the goals of codification . . . .").

is evidence of early support for the Restatement movement as the natural precursor to "the ultimate legislative restatement of law, from which judicial decision shall start afresh."[132]

E. Criticism of the Institute's Philosophy of Law

The Restatements have been criticized as exaggerating the role of law, especially the common law. Instead, some scholars have asserted, the law of any case can never be articulated without controversy and cannot credibly be represented as uncontroversial.[133] In addition, Critical and Realist scholars have suggested that common-law principles can be marshaled to support any position.[134] This is an area in which perceptions have evolved over time. Even Herman Wechsler, then Director of the American Law Institute, recognized on the occasion of the Institute's 50th anniversary that the founders' perspectives on the discrete, finite nature of law may seem different from those of lawyers today.[135]

Debunking the myth of common law's dominion and reasonableness was a common Realist theme. Roscoe Pound's response was to encourage opinion leaders not to be afraid of statutes and the progressive reform they symbolized.[136] Pound expressed his agreement with the observation that "the courts in practice tend to overturn all legislation which they deem unwise."[137] Karl Llewellyn's

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132. DUXBURY, *supra* note 75, at 59 (noting that "Pound's passion for classifying fields of law accorded well with the American Law Institute's Restatement project").

133. *See* Milner, *supra* note 26, at 803 ("[I]s there any one 'principle' for which a case stands? Will all future decision-makers, looking at the same case, agree on its 'holding'? Or will some take broad views of it and others take restrictive views, according to the particular policies they are trying to follow in the cases before them?").

134. For an example of this phenomenon, see *infra* note 158 and accompanying text. *See also* Milner, *supra* note 26, at 805 (describing a certain case as "not authority for any *one* proposition but . . . relevant as support for any number"). Milner goes on to state, "[T]he 'rule' is a composite creature. When a judge announces that he is following such-and-such a case, i.e. that he is extending its 'rule' to cover the case before him, he is performing an extremely complicated intellectual task." *Id.* at 811.

135. AMERICAN LAW INSTITUTE, *supra* note 38, at viii. Wechsler states,

> No less than other documents, the Report [of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law, which recommended the creation of what became the ALI] is a product of the time when it was drafted. . . . The remedies proposed may seem in our perspective to exaggerate the ultimate potential of judicial action for unifying and adapting the enormous product of a plethora of case law systems, and to under-estimate the promise of systematic, renovating legislative work in many of the areas of lawyers' law.

Id.

136. Pound, *Law in Books*, *supra* note 93, at 44 ("Let us not be afraid of legislation, and let us welcome new principles, introduced by legislation which express the spirit of the time.").

137. *Id.* at 39.

approach to the issue was to focus on the indeterminate nature of judge-made law. Llewellyn cautioned that simply calling something a rule does not provide enough information. Instead, he urged, it is important to determine whether courts really follow a rule or just recite it.[138] Stated another way, the Realist view was that rules do not wholly guide judges; rather, judicial analysis is relatively flexible and more complex than might be assumed.[139] A more critical Realist position was that judicial opinions are dishonest intellectually but serve an important function in creating legitimacy.[140]

These criticisms have sometimes been phrased in a way that seems to call the Restatement project directly into question.[141] Lawrence Friedman describes the American Law Institute as being "dedicated to the pursuit of legal rationality"—a rationality that Friedman contends is illusory.[142] More pejoratively, "Thurman Arnold analyze[s] the meetings of the American Law Institute as a form of ritual, the incantations of a priestly caste reassuring the legal world of its orderliness and predictability, among other means through the use of charming parables (the 'Illustrations' of Restatement principles)."[143] Professor Thomas Ulen suggests, as a more reliable alternative than reliance on the rule of law, that economics is

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138. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), *reprinted in* AMERICAN LEGAL REALISM 55 (William W. Fisher et al. eds., 1993) [hereinafter Llewellyn, *A Realistic Jurisprudence*]. Llewellyn considered several different possible meanings of the statement, "[T]his is the rule." *Id.* He went on to state, "[R]ules of substantive law are of far less importance than most legal theorizers have assumed in most of their thinking and writing, and . . . they are *not* the most useful center of reference for discussion of law." *Id.* at 56 (emphasis in original).

139. AMERICAN LEGAL REALISM, *supra* note 21, at 164 (noting the moderate Realist position, "[J]udges sometimes to some degree pay attention to the 'paper rules,' but that they are also influenced powerfully by other considerations.").

140. *Id.* at 165 ("By making each decision seem inevitable, opinions deflect popular criticism of the courts' rulings and conceal from the judges themselves the true bases of their rulings.").

141. *Id.* at 166 ("[T]he Realists argued that scholars and judges should jettison most of the accepted 'black letter' rules and develop 'working rules' that would more accurately describe the actual behavior of courts."). The editors describe the Institute as "an influential group of law teachers . . . elaborating its own version of classicism." *Id.* at xii. The editors continue,

> Properly organized, law was like geometry, the teachers insisted. Each doctrinal field revolved around a few fundamental axioms, derived primarily from empirical observation of how courts had in the past responded to particular sorts of problems. From those axioms, one could and should deduce—through uncontroversial, rationally compelling reasoning processes—a large number of specific rules or corollaries.

Id.

142. Friedman, *supra* note 115, at 355-56 ("The bar's organized public energy crystallizes around reform and institutions committed to reform.").

143. Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, *in* HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES 75, 98 (Anthony T. Kronman ed., 2004).

an appropriate lens for viewing what the law is and what it should be.[144]

A related criticism is that the very existence of the Restatements represents an overemphasizing of the role of the common law vis-à-vis statutory law in the modern age. There is some evidence to support this criticism: then-contemporary Institute leader George Wickersham describes the common law, rather than statutes, as being the essence of American law.[145] In addition, when the Restatements do address statutory law, they may exaggerate their rationality. For example, one scholar has made the observation that the first series of Restatements adopted the then-current view of legislatures as being democratic and were also influenced by Hart and Sacks in their belief in the inherent reasonableness of the legislative process and its product.[146]

Critical scholars and Realists would dispute any characterization of law as being inherently rational. Law & Economics scholars would propose efficiency as an alternative focus and a more realistic goal. Roscoe Pound, a Realist for much of his career, opined that lack of equal bargaining power makes liberty of contract a farce for the weaker party, thus calling into question the reasonableness of a system of private law built around this principle.[147] Pound also asserted that, due to the inequitable distribution of resources and the resulting disparity in access to the court system, a substantively different criminal law exists for rich and poor defendants.[148] Professor Lawrence Solum made a similar point when he described the liberal approach to law as mystifying,

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144. Ulen, *supra* note 91, at 433 ("[L]aw and economics offers an attractive method of describing how people are likely to respond to law and of making normative judgments about legal rules and institutions."). The possibility of incorporating economic theory more overtly into the Restatement process is discussed *infra* in notes 294-97 and the accompanying text.

145. Wickersham, *supra* note 66, at 454-55 ("Altered, modified, moulded by judicial decision, sometimes clarified, sometimes obscured by statute, the common law is still the wool and fabric of the law of America, against which statutes often vainly contend and through which they always must be interpreted."). The author goes on to praise the common law: "The common law, as Lord Bowen once said, is 'an arsenal of common sense principles.'" *Id.* at 455.

146. Zeppos, *supra* note 84, at 659 ("As envisioned by Hart and Sacks, each governmental institution—judiciary, legislature, and executive—had unique capabilities and procedures that legitimated the decisions they reached. . . . As for the legislature, its ability to be open to different groups, along with its electoral pedigree, meant that its work was due respect by the coordinate branches of government.").

147. Pound, *Liberty of Contract*, *supra* note 117, at 27. Pound quoted a sociologist as saying, "[M]uch of the discussion about 'equal rights' is utterly hollow. All of the ado made over the system of contract is surcharged with fallacy." *Id.*

148. Pound, *Law in Books*, *supra* note 93, at 40. Pound states,

> The malefactor of means, the rogue who has an organization of rogues behind him to provide a lawyer and a writ of *habeas corpus* has the benefit of the law in the books. But the ordinary malefactor is bullied and even sometimes starved and tortured into confession by officers of the law.

Id.

obscuring, and ultimately falsely legitimizing the current system of law.[149] Related to this is the belief, common to Realists and Critical scholars, that Classicists overemphasize the distinction between public and private law.[150] Professor Ulen suggests that Law & Economics scholars would also downplay this distinction, albeit for reasons of maximizing efficiency rather than due to the social-justice concerns that typically motivate Realist and Critical scholars.[151]

Arthur Corbin presents a different viewpoint, suggesting that the Restatements normally look more critically at the common law than these scholars suggest. He asserts that "[a] stated rule used by [any] court as a basis of decision must fight for its life [in the Restatement process] whether the rule is enunciated by a state court or by the United States Supreme Court."[152] Corbin and others also praise the common-law process as a useful, coherent source of law.[153] In addition, there is some evidence that the Institute founders believed the lack of respect for the common law was due to the very defects that the Restatement project sought to cure, and thus would be ameliorated over time as the work of the Institute progressed.[154]

The Restatements are also criticized as reflecting the false assumption that precedent can be understood logically.[155] Instead, Critical scholars have claimed that common-law precedent can be used to marshal support for any position a lawyer might choose to take on behalf of a client.[156] Llewellyn made a similar claim with regard to the canons of statutory construction, suggesting that there were opposing canons for every circumstance.[157] This concept of malleability of

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149. Lawrence B. Solum, *On the Indeterminancy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462 (1987). "Frequently, the claim that legal rules are indeterminate is the starting point for such a critique of the rule of law." *Id.* Solum dubs this the "indeterminacy thesis." *Id.*

150. *See infra* Part II.C., notes 310-15.

151. Ulen, *supra* note 91, at 435 ("I speculate that economic theory will prove to be the force that provides a unifying theory among the now-distinct areas of private law, between private and public law, between law and social norms, and between different national legal systems.").

152. Corbin, *supra* note 37, at 25.

153. *Id.* at 26 ("A law is a statement of uniformity in the past sequence of events, based upon the recorded observation of those events, by the help of which we believe that we are able to predict the future course of events.").

154. AMERICAN LAW INSTITUTE, *supra* note 38, at 16. After describing the complexity and uncertainty that the Institute sought to remedy, the author then noted that "[p]erhaps . . . the most serious result of these defects is that they create a lack of respect for law." *Id.*

155. FRIEDMAN, *supra* note 87, at 582 ("[The] arrangements [of the Restatements] were strictly logical; the aim was to show order and unmask disorder."). Friedman goes on to state, "Courts that were out of line could cite the [R]estatement and return to the mainstream of common law growth." *Id.*

156. Tushnet, *supra* note 53, at 1524 ("As it was derived from the analysis of paired oppositions, the indeterminacy argument held that within the standard resources of legal argument were the materials for reaching sharply contrasting results in particular instances.").

157. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or*

precedent brings to mind the Realist cliché that "how a judge decides a case on a given day depends primarily on what he or she had for breakfast."[158] Oliver Wendell Holmes presents a more measured critique, pointing out that law is not wholly logical as mathematics is, but going on to describe that fallacy as being understandable due to the training that lawyers receive in logic.[159] Other Realists have raised the moderate points that "much legal doctrine is internally inconsistent"[160] and that a focus on consistency tends naturally toward oversimplification.[161] Part of this critique is specifically focused on Formalism. Roscoe Pound criticizes Formalism for twisting facts against common experience to reinforce old notions, ignoring real-world needs and conditions.[162] Pound also asserts that it is not possible to make logical sense of a chain of legal

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Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395 (1950), *reprinted in* AMERICAN LEGAL REALISM 228 (William W. Fisher et al. eds., 1993) (giving twenty-eight paired examples of opposing canons of statutory construction, beginning with "[a] statute cannot go beyond its text" and "[t]o effect its purpose a statute may be implemented beyond its text").

158. AMERICAN LEGAL REALISM, *supra* note 21, at xiv. Others make the same point in a more moderate manner. *See* Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927), *reprinted in* AMERICAN LEGAL REALISM 242, 247 (William W. Fisher et al. eds., 1993) (expressing incredulity that "eminent members of the bar [still] assert that all a court does in deciding doubtful cases is to deduce conclusions from fixed premises . . ."); JEROME FRANK, LAW AND THE MODERN MIND (1970), *reprinted in* AMERICAN LEGAL REALISM 205 (William W. Fisher et al. eds., 1993) (asserting that judges are no more and no less biased than other people are); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928), *reprinted in* AMERICAN LEGAL REALISM 199 (William W. Fisher et al. eds., 1993) ("Judges are men and men respond to human situations."); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925), *reprinted in* AMERICAN LEGAL REALISM 195, 198 (William W. Fisher et al. eds., 1993) (suggesting that courts always have opinions as to the right outcome for a given set of facts). Some suggest that the law should embrace, rather than hide from, the inherent discretion that judges exercise. *See* Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929), *reprinted in* AMERICAN LEGAL REALISM 202, 204 (William W. Fisher et al. eds., 1993) (suggesting that, in close cases, the use of the judicial "hunch" makes the outcome more trustworthy, not less so).

159. Holmes, *The Path of the Law*, *supra* note 21, at 19. Holmes states that "[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding." *Id.*

160. AMERICAN LEGAL REALISM, *supra* note 21, at 165 (adding that "it is therefore naive to believe it possible either to derive particular legal rules from general concepts and particular outcomes from the application of rules to facts or to derive the answer to one case from a prior decision in a related case").

161. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924), *reprinted in* AMERICAN LEGAL REALISM 185, 188 (William W. Fisher et al. eds., 1993) (explaining the use of precedent and familiar concepts as a sort of "inertia").

162. Pound, *Liberty of Contract*, *supra* note 117, at 33 (describing what Pound characterizes as the tendency to insist upon sharp demarcations in the law and to draw those lines arbitrarily).

precedent.[163] Instead, Pound claims, courts bend rules to bring about justice as they see fit in individual cases.[164] This claim is specially pertinent insofar as the Restatements are viewed as a Formalist endeavor.[165] Of course, there is also evidence to the contrary—evidence that tends to suggest that the American Law Institute took measured steps to ensure that its Restatements would reflect the modern law accurately,[166] rather than serving as a historical record of the way the law had been in the past.[167]

Related to the claim that the Restatements over-emphasize the logic of judicial precedent is the criticism that the Restatements express a level of uniformity and clarity in the law that simply do not exist, and they are therefore misleading.[168] Alan Milner makes the same point in a way that challenges the

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163. Pound, *Law in Books*, *supra* note 93, at 41 ("When . . . one turns to the cases themselves and endeavors to fit each case in the scheme, not according to what the court said was the rule, but according to the facts of that case, he soon finds that the apparent rules to a great extent are no rules . . . .").

164. *Id.* ("The forms may be kept, but the substance will find some fiction or some interpretation, or some court of equity or some practice of equitable application, to sanction change."). Pound describes the judicial lawmaking process:

> Legally, the judge's heart and conscience are eliminated. He is expected to force the case into the four corners of the pigeon-hole the books have provided. In practice, flesh and blood will not bow to such a theory. The face of the law may be saved by an elaborate ritual, but men, and not rules, will administer justice . . . .

Id.

165. *See infra* notes 203-15 and accompanying text.

166. GOODRICH, *supra* note 51, at 288 (indicating that the Restatements were not intended to show the "ideal rules of law," but instead the true state of current law, acknowledging the existence of trends).

167. KALMAN, *supra* note 62, at 38-39 (describing the manner in which Thurman Arnold and Charles Clark sought to protect the accuracy of the product by limiting its reliance on historical fact). Kalman states,

> [W]hen the American Law Institute began planning its Restatements of the Law, Arnold and Clark opposed any stress on the history of legal rules out of the fear that it would serve to heighten the legitimacy of those rules. Arnold proposed an emphasis on the obsolescence of traditional legal machinery through the use of section headings such as "The Statute of Uses of Henry VIII is the origin of certain artificial concepts which have no utility in solving modern problems and may therefore be discarded as a method of judicial expression." Clark more soberly warned the committee drafting the Restatement of the Law of Property against treating "property history" as modern American law: "Dicta repeating the rules of Lord Coke's time without independent consideration of them are of comparatively little value."

Id.

168. Goodrich, *supra* note 39, at 507 (including the comments of Hessel Yntema that "[t]he conception of restating the law as it is is not merely ambiguous, but it places the Reporters in an unenviable position, which can only be concealed by verbal compromise and censorship"). Yntema states, "Where there is diversity in the law, how can it be stated in a single rule? Where there is

fundamental reliance on precedent: "[T]he only conceivable purpose in looking at past decisions is to see whether there are any policies which transcend even the individuality of the different judges; to weigh them in their context of time, place and effect; and, the vital push, to assess their value for future decisions."[169] Max Rheinstein has described the Restatements as misleading for a different reason in that they contain "a law that . . . is in effect everywhere and nowhere."[170] Professor John R. Brock proposes an alternative approach from the field of economics, suggesting increased use of deductive reasoning and decreased reliance on precedent.[171]

A contrasting viewpoint is that the Restatements, by making it easier for judges to overrule former precedent as needed, will ultimately create a *less* misleading body of law.[172] In addition, Roberto Unger provides an interesting counterpoint to the Realist critique of the common law, suggesting that the Realists went too far and lost credibility by implying that there was no coherence to the common law whatsoever.[173]

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uniformity, what is the need for Restatement?" *Id.*

169. Milner, *supra* note 26, at 812. Milner adds, "The Restatements are completely inadequate here. In concentrating exclusively on the verbalizations of the judges and not approaching the study of past decisions from a functional angle, they give no accurate trend in decision-making which can be of any use." *Id.*

170. Rheinstein, *supra* note 125, at 692. Rheinstein acknowledges that this is probably inevitable, given the nature of the Restatement project. "An attempt to teach the law of every jurisdiction not only would be impossible, it would be sheer nonsense." *Id.* Thus, "[t]he curriculum necessarily must concentrate on those elements which are common to the laws of all the states." *Id.* Interestingly, this same scholar goes on to praise the case method, so often decried as being woefully and formalistically out of date. In this process, Rheinstein states,

> Inevitably, one begins to search for the policy reasons by which the judges were moved, and one seeks to discover the ways in which life is actually being affected by the work of the courts . . . . Thus comes the realization that judges, through their decisions, can influence the course of social life, can restructure society, can be social engineers.

Id. at 694-95.

171. Brock, *supra* note 95, at 210. The author states,

> The economist's approach is to draw logical deductions from generalized observations of behavior within society. This approach permits economists to be clear and precise about the issues . . . On the other hand, the law's approach of reasoning by analogy places on judges and scholars the difficult burden of explaining every case.

Id. Brock quotes Judge Posner for the proposition that "economics . . . is free of entanglements of precedents and legalism that prevent lawyers from rethinking a field from the ground up." *Id.*

172. Stone, *supra* note 112, at 322 (noting that "[t]he frank overruling of precedent, for reasons well understood, is rarely resorted to").

173. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 62 (1996) ("American [L]egal [R]ealists and post-[R]ealists . . . romanticized the common law as the product of an experimental and context-bound reasoning that made legal abstraction look obtuse."). Unger goes on to discuss what he calls "[t]he incongruity of the scorn for analogy." *Id.*; *see also* Ellickson, *supra* note 96.

Several Realist critiques focus on the organization and format of the Restatements, suggesting that the classifications presented are not useful. Instead, Realists have tended to propose narrower, more fact-specific case groupings.[174] Thus, it is apparent that not all Realists wholly reject the ideals of ordering and predictive generalization; instead, some have espoused the more moderate view that classifications can be valuable if they are narrow and empirically based.[175] Moderate Realists object only to those groupings that they characterize as artificial.[176]

Samuel Williston provides one response to this critique, especially insofar as it is directed at the Restatement of Contracts, for which he served as reporter. He argues that the Realists have tended to make the law more complex than necessary by denying the existence of a relatively small number of "fundamental principles" that govern most situations.[177] He chides the Realists for falsely implying that every situation is unique and thereby undermining appropriate confidence in these foundational principles.[178] Early Institute documents reflect a similar concern that over-parsing of the law could ultimately result in needlessly convoluted case law.[179]

Others share Williston's belief that the common law should consist of broad principles, rather than fractured bits of precedent, and that the Restatements

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174. Llewellyn, *Some Realism*, *supra* note 56, at 73 (noting "[t]he belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past").

175. AMERICAN LEGAL REALISM, *supra* note 21, at 166.

176. Crystal, *supra* note 74, at 247 ("Thurman Arnold . . . criticized the organization of the Restatement of Trusts. He argued that classification should be based on the function of the trust device, rather than on the rational reformulation of old categories such as active trust, passive trust, and resulting trust.").

177. KALMAN, *supra* note 62, at 47.

178. *Id.* (criticizing "those who considered the 'simplest application of fundamental principles of contract' in an insurance policy or contract of suretyship as 'peculiarities' unique to the factual situation involved"). Describing Williston's view of the role of a Restatement, Kalman continues: "He emphasized the need 'to treat the subject of contracts as a whole and to show the wide range of application of its principles.' For Williston, the 'whole' body of contract law was much more limited than it was for some of his contemporaries." *Id.* (footnote omitted). Along the same lines, the report of the committee that recommended the founding of what ultimately became the Institute decried, among other things, "attempts to distinguish between two cases where the facts present no distinction in the legal principle applicable." AMERICAN LAW INSTITUTE, *supra* note 38, at 17.

179. AMERICAN LAW INSTITUTE, *supra* note 38, at 65 (expressing concern that a court, faced with a decision in which it disagreed with applicable precedent, "may refuse to follow the prior decision, but so far pay formal respect to it as to write an opinion in which the court instead of frankly overruling the prior case attempts to distinguish the two cases on account of some immaterial difference in their respective facts"). One of the stated goals of the Restatement movement was to make it easier for judges to feel confident in overruling out-of-date or otherwise unsuitable case law. *See* Stone, *supra* note 112.

should make sure the common law remains general and cohesive.[180] One consistent view is that individuation and specific application of broad principles should be left to judges, who perform this function best.[181] Most Realists, with the exception of the most radical, recognize that some consistency is needed and should not be wholly eroded, even due to compelling facts in individual cases.[182] The Institute has sought to find an appropriate balance. Herbert Goodrich cautions that the principles contained in the Restatements should not be too broad or too narrow to be useful, but also acknowledges that erring on either side is probably inevitable to some extent.[183]

Professor Solum expresses a slightly different concern, making the Critical argument that the legal system cannot produce predictable, justifiable results in individual cases—rather, only social and political judgment can effectuate justice consistently.[184] Thus, a Critical scholar would see the Restatements as overstating the power of the law to accomplish knowable results, regardless of whether the principles used are broad or narrow.

F. Criticism of the Restatements' Commercial Practicability

The Restatements have also been criticized for ostensibly failing to keep up

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180. *See* STEVENS, *supra* note 74, at 133. Stevens writes about the "atomistic approach to the common law" associated with the case method and the veritable explosion of published cases in the early part of the twentieth century. *Id.* He describes the Restatements as a response to the "'wilderness of single instance' that the American common law had become." *Id.*

181. Franklin, *supra* note 73, at 1391-92. Franklin states,

> Some juridical problems cannot be dealt with in job lots, others can and should be. The first should not be restated or codified, the second should be. . . . The Institute should have taken account of this problem of the division of labor, and refrained from a sortie into the proper domain of the judge.

Id.

182. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), *reprinted in* AMERICAN LEGAL REALISM 172, 173 (William W. Fisher et al. eds., 1993) ("We must not sacrifice the general to the particular. We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance.").

183. Goodrich, *supra* note 61, at 453. Goodrich states,

> One may . . . admit that there are difficulties about the form in which the Restatement is cast. A writer is in danger of making his generalizations so broad that they are meaningless on the one hand, or, on the other, setting out his blackletter rules with such particularity that the user becomes immersed in a flood of detail. Instances probably can be found of both faults by even a friendly critic of any one of the portions of the Restatement which have appeared.

Id. (footnote omitted).

184. Solum, *supra* note 149, at 465 ("Critical scholars often try to demonstrate that a given body of legal doctrine is indeterminate by showing that every so-called legal rule is opposed by a counterrrule. Because the rule and the counterrule support opposing results, the authoritative legal materials, taken as a whole, fail to provide determinate outcomes in any given case.").

with the viewpoints and priorities of practitioners. As an example of this phenomenon, Jonathan Macey asserts that the Institute's Principles of Corporate Governance have been unsuccessful because they failed to take Law & Economics to heart, as corporate attorneys have.[185] Critiquing the practical value of the Restatements in a different way, Alan Milner argues that the elitism and the unrepresentative nature of the Institute ensure that the Restatements cannot credibly claim to be the voice of the legal profession.[186] Milner's comment raises the question of whether any group could ever fully represent the diverse body of lawyers, judges, and legal academicians as a whole.[187]

The existence of discord between the Institute and the larger body of practicing attorneys could be a natural outgrowth of the fact that most Restatement reporters are law professors—a group that is fairly removed from the crucible of public opinion.[188] Consistent with this fact, the Restatements have been described as being overly academic and historical in approach; the original Restatements were described as naively "[h]arking back to medieval precedents" in a way that "was not relevant to an America beset by the [D]epression."[189] A

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185. *See generally* Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212 (1993). Instead, the author describes the project as a "wish-list of reformers." *Id.* at 1217. The author traces much of the controversy surrounding the project to the fact that "the intellectual revolution caused by the [Law & Economics] movement caught up with the [p]roject." *Id.* at 1224. Elsewhere, the author claims that the project ultimately faltered because it could not hold up to Law & Economics scrutiny. *Id.* at 1228 (noting that "the [Law & Economics] scholars were able to present scientific evidence that allowed them to claim that the existing, market-oriented legal norms were superior to the ALI's proposed norms from the perspective of the investing public"). For a contrary view—that the project actually did incorporate lessons of Law & Economics, see generally E. Allan Farnsworth, *Law Is a Sometime Autonomous Discipline*, 21 HARV. J. L. & PUB. POL'Y 95 (1997).

186. Milner, *supra* note 26, at 798 ("The real question is how far a legal document which does not and cannot represent the views of other than a few named individuals can properly stand as the authentic voice of the profession." (quoting Charles Clark, *The American Law Institute and Law of Real Covenants*, 52 YALE L.J. 699, 730 (1943))). Milner goes on to assert that, "there is simply no such thing as a state having altered its method of judging on the basis of a *Restatement* 'rule.'" *Id.* at 802 (emphasis in original).

187. For example, John Henry Schlegel suggests that Critical scholars could not properly purport to represent the dominant views of practitioners. Schlegel, *supra* note 21, at 410 ("Less successful [than attempts to incorporate young scholars] have been attempts to involve practitioners who share a common politics in the organization . . . . The mismatch is obvious: Practice is only tangentially relevant to a group largely engaged in dejustifying rules, for examining the law in action is only a variation on the other CLS techniques for achieving that end."). This comment raises the question of whether it would even be feasible for the Institute to involve Critical scholars in the Restatement project. *See infra* text accompanying notes 281-316.

188. Simmons, *supra* note 28, at 70 ("The ALI version of a relevant rule of law is often the mere reflection of the legal philosophy of the ALI reporter (a law professor) as to what the relevant rule of law should be.").

189. STEVENS, *supra* note 74, at 141 ("Much of what the Restaters—a favorite target of the

related criticism is that the Restatements have, by the nature of Institute process, produced a noticeably different product from law that would have been created by a democratically elected legislature.[190]

The Institute has expressed its awareness of each of these critiques and has arguably been fairly responsive to some. There has been at least some attempt to ensure that the black-letter principles captured in the Restatements reflect the realities of law as applied. Realist Arthur Corbin, for example, worked as an adviser to Samuel Williston during the latter's tenure as reporter for the Restatement of Contracts.[191] Corbin encouraged Williston to ensure that the Restatement of Contracts reflected the law as practiced, not just as discussed in theory.[192]

In addition, not all scholars agree that the American Law Institute is dominated by academicians. Indeed, Judge Posner and Justice Abrahamson have challenged this common conception.[193] Finally, it is possible that any lag

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Yale faculty—were trying to do, by way of consolidating basic principles of the common law in different areas, was indeed naive."). Similarly, Hart and Sacks describe a time when Institute members knowingly and expressly voted in favor of a rule that all present admitted was archaic. HART & SACKS, *supra* note 50, at 739-40 (describing the discussion of one of the principles of agency, which even Reporter Warren Seavey described as "shocking" and "archaic" in application). For a discussion of the first Restatement of Agency, see Deborah A. DeMott, *The First Restatement of Agency: What Was the Agenda?*, 32 S. ILL. U. L.J. (forthcoming 2007).

190. I explore this possibility in an earlier article. *See generally* Adams, *supra* note 2; *see also* Simmons, *supra* note 28, at 70-71 ("Often the adopted ALI rule does not reflect what the relevant rule of law would have been if the matter had been the subject of public hearings with input from a broad-based citizen constituency with public debate, and with final action required to be taken by legislators who are directly accountable to their general public constituency.").

191. *See* KALMAN, *supra* note 62, at 26.

192. *Id.* ("Publicly Corbin defended the [Restatement] effort; privately he worked to persuade Williston to state working rules that accurately described the realities of law.").

193. POSNER, *supra* note 27, at 304. Posner states,

> The influence of academics preponderates in the shaping of the Institute's work because they alone have the time to produce the kind of output in which the Institute specializes. But the preponderance of practitioners in the membership, along with a generous sprinkling of state and federal judges, prevents the academic members from losing touch with the practical needs of the profession. On controversial as distinct from technical issues, the influence of practitioners and judges, expressed in voting in both the Council and at the annual meetings, is apt to dominate.

Id. Justice Abrahamson also notes the concern for maintaining the balance among the three constituent groups of Institute members: judges, professors, and practitioners. She also describes two different views of the extent to which the Institute has been successful in maintaining this balance:

> Although the [R]estatement process combines scholarship with practical experience and involves the academy, the bench and the bar, some continue to assert that it does not ensure a healthy balance among the ALI's constituent groups. These critics contend that the [R]estatements are predominantly the work of the reporters, generally law

between societal change and the recognition of that change in the Restatements is simply inevitable. John Dewey has suggested that statutes can never keep up with the changing state of society.[194] The same kind of critique would seem to apply to the Restatements, which, like statutory law, are the products of a lengthy deliberative process.

The Restatements have been criticized as reflecting the old-fashioned view that judges apply the law rather than make the law or at least participate in its making. By way of explanation, John Chipman Gray described the Blackstonian Formalist view of the judicial function as stressing that the law of the land must be assumed to be dictated by the latest decisions.[195] This strict adherence to the concept of precedent means that no law is ever treated as truly new.[196] As Thurman Arnold stated when characterizing the Restatements as a Formalist project, "It [is] not the function of the Restatement to fabricate but only to assay and extract the nuggets which, being pure gold, [do] not even need gilding."[197] Some scholars go a step further, describing the Restatements as claiming to

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> professors, who are little influenced by the advisers, Council, or members. They complain that a persistent professor-reporter can usually prevail, thus providing an overbalance of academic sway in the [R]estatements and the ALI. William Draper Lewis, on the other hand, pointed out that the advisers examined the drafts with minute care and suggested that "the name 'Advisers' did not express accurately or adequately their actual relation to the work which, except in individual instances, would be more properly described as 'Co-Workers with the Reporter.'"

Abrahamson, *supra* note 32, at 16 (quoting William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law: "How We Did It," in* RESTATEMENT IN THE COURTS 1, 7 (1995)). Justice Abrahamson goes on to state,

> In my experience the Council, members and reporters respect and protect each others' roles. I have heard reporters yield to the Council and membership, saying that they are persuaded or that the product is the ALI's, not the reporter's. At other times the reporters prevail because their position has merit and the members have confidence in them. Often the final position is a compromise reached among the reporters, advisers, consultative group, Council and membership.

Id. at 16-17; *contra* Franklin, *supra* note 73, at 1371 ("The position of the judges as paramount is weakened by the Restatements, but their loss is the gain in prestige of the university law school teacher.").

194. Dewey, *supra* note 161, at 192-93 ("[S]tatutes have never kept up with the variety and subtlety of social change.").

195. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW (1909), *reprinted in* AMERICAN LEGAL REALISM 36 (William W. Fisher et al. eds., 1993) ("Blackstone's theory was urged with great force, that the decisions of the courts did not make [l]aw; and that the [l]aw must be taken to have been always what the latest decisions declared it to be.").

196. *Id.* ("The doctrine of precedent, correctly stated, forbids the assumption that a new law was created by the prior decision . . . .").

197. Arnold, *supra* note 119, at 817. Arnold also noted, "The source of the law was the cases, which needed only to be boiled down. The completed product of the Restatement which is now before us represents the results of that great intellectual smelter." *Id.*

represent natural, or divine, law.[198]

By way of contrast, realism and other, more contemporary schools of thought embrace the idea of judges as lawmakers.[199] The Realists also espoused the more controversial idea that judges have not only the right but also the duty to make law,[200] particularly in matters of first impression.[201] Realist scholars also note how the myth of judges as law-finders has been perpetuated by the judges themselves, fearful of seeming to make the law.[202] This balance-of-power debate as to the appropriate roles of the judiciary and legislature continues today.

Having presented six recurring threads in the scholarship that critiques the Restatement movement, this Article will now present three perspectives on the movement as a whole, showing how it might be seen as wholly Formalist, surprisingly progressive, or purposefully moderate.

II. VIEWS OF THE RESTATEMENT MOVEMENT

A. The Dominant Perspective: The Restatements Are a Throwback to Formalism

The most common criticism of the Restatements is that they are a throwback to the era of Formalism, not recognizing the ways that the leading trends in jurisprudence have developed and influenced the law since the American Law Institute was founded in 1923. Stated another way, one popular perspective on the Restatement movement is that it was and is a conservative reaction against the onslaught of Legal Realism,[203] representing a last gasp of Classicism.[204] This

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198. Franklin, *supra* note 73, at 1374 (describing the position of the Institute as being that "the Restatements are to be binding because they embody natural law and must, therefore, be observed"). Gray also suggests that perhaps judges need to fool themselves or others into believing that they do not make law. He states,

> Whether it is desirable that such remarks [about judges being lawmakers] should be made, or whether, if made, it is desirable that they should be believed, whether it is desirable that the judges' power and practice of making [l]aw should be concealed from themselves and the public by a form of words, is a matter into which I do not care to enter. The only thing I am concerned with is the fact. Do the judges make [l]aw? I conceive it to be clear that, under the [c]ommon [l]aw system, they do make [l]aw.

GRAY, *supra* note 195, at 37.

199. AMERICAN LEGAL REALISM, *supra* note 21, at xv ("To a degree far greater than their counterparts in virtually any other country, American judges think of themselves as lawmakers. That self-image originates to a large degree in Legal Realism.").

200. *Id.* at 168 (noting the Realist belief that, if judges disagree with the policies behind the laws they are required to uphold, they should change the laws).

201. Cook, *supra* note 158, at 249 (asserting that judges have no choice but to legislate in matters of first impression).

202. *See* GRAY, *supra* note 195, at 34 ("[T]he judges have been unwilling to seem to be law-givers, because they have liked to say that they applied [l]aw, but did not make it . . . .").

203. Crystal, *supra* note 74, at 239 ("Grant Gilmore and Lawrence Friedman have

criticism is not entirely unfounded; there is some evidence that the movement was perceived in this way by scholars at the time of its inception.[205] There is also plenty of evidence that at least some early Realist scholars were very critical of the Restatement project, even at its founding.[206] A common critical

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characterized the Restatement project as a reactionary attempt by the legal establishment to maintain the common law system against the attacks of the [L]egal [R]ealists and the threat of codification."). Another scholar has described the Restatement project and its perceived influence on the rise of [L]egal [R]ealism:

> But for the classical generation's projects of legal science, the treatises and articles of Langdell, Ames, Beale, Williston, and Scott, and the Restatement projects that came about as close as American common lawyers could get to comprehensive codifications of private law, there could have been no [L]egal [R]ealist movement. But for the classics' heroic work of generalization, doctrinal rationalization, and synthesis—and, I should add, the fifty years' work of classical lawyers, judges, and treatise-writers in building up the imposing structures of classical constitutional law—there would have been nothing to critique as "empty formalism" and "transcendental nonsense"—as sterile, oppressive, over-abstract, indeterminate, and removed from life.

Gordon, *supra* note 143, at 130 n.64.

204. Cohen, *supra* note 56, at 217 ("The 'Restatement of the Law' by the American Law Institute is the last long-drawn-out gasp of a dying tradition."); *see also* DUXBURY, *supra* note 75, at 24 (describing the Restatements as espousing the theory of law as its own science). The author asserts,

> The ALI had bestowed professional credibility on the Langdellian idea that the basic principles of the law are simply there to be discovered by logical analysis and thereafter reported in a fashion which reflects their "real"—meaning unambiguous—nature. For the [R]ealists, the Restatement movement represented the high-water mark of Langdellian legal [F]ormalism.

Id. at 24. Lawrence Friedman made the same point: "[T]he [Uniform Commercial] Code was modernity itself compared to the [R]estatements of the law, perhaps the high-water mark of conceptual jurisprudence." FRIEDMAN, *supra* note 87, at 582. Justice Abrahamson describes a similar impression and also brings in the specter of anti-codification, discussed *supra* at notes 114-40. Abrahamson, *supra* note 32, at 18 ("The conventional wisdom . . . is that the ALI was founded 'by a band of legal [F]ormalists working hand in hand with the legal moguls of New York and Philadelphia corporate finance to save the common law from statutory liberalization and other un-American pollutants.'" (quoting N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 56 (1990))).

205. Roscoe Pound has been described as "an ardent supporter of the American Law Institute and its work with the Restatements, regarding it not merely as an effort to produce a national legal system but also as an effort to beat back the Realist movement." STEVENS, *supra* note 74, at 136; *see also* DUXBURY, *supra* note 75, at 60 ("To [Pound's] eyes, the Restatements were not merely an effort to produce a national legal system; they were also a challenge to [L]egal [R]ealism.").

206. Justice Abrahamson captures several of these criticisms, including the criticisms of Professor Herman Oliphant, Judge Learned Hand, and Justice Holmes. Abrahamson, *supra* note 32, at 13-14. Oliphant expressed his concern that, in restating the law, the Institute would necessarily make the body of common law appear more consistent and logical than it is. *Id.* Hand

characterization of the American Law Institute at that time was as the "priesthood" of orthodox Formalist legal thought.[207] This argument is bolstered by the fact that so many Harvard scholars were involved in the movement at its beginning.[208] In fact, the dominance of conservative Harvard Law School in the First Restatement series[209] continued to some extent in the second series.[210] In addition, one might note the choice of Elihu Root—who has been characterized as a Formalist[211]—as the first President of the Institute, from 1923 to 1937.[212] Likewise, former Institute Director Herbert Wechsler has been described as a leader in the relatively conservative Legal Process school.[213] Carrying these observations of Formalist involvement in the Institute further, some have gone so far as to describe the Restatement project as being attractive only to older and less intelligent scholars.[214] Similarly, the Restatement taxonomy itself has been described as Formalist, outdated, and uncreative.[215]

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feared that the project would reflect "little regard for the law's social context." *Id.* Holmes described himself as an "aged skeptic" who found little new in the Institute's efforts. *Id.*

207. Gordon, *supra* note 143, at 97 ("[T]he American Law Institute . . . periodically assembled the entire priesthood [of legal orthodoxy] for the particularly sterile enterprise of producing Restatements of the Law."); Milner, *supra* note 26, at 795 (describing the development of jurisprudence over the first half of the 20th century as "that same concentration on formality, on the rule of the rule, which has been the key-number of Anglophile jurisprudence since Blackstone"). Milner goes on to focus the balance of his article on the Restatement movement. *Id.* at 795-826.

208. KALMAN, *supra* note 62, at 14 (noting that "Harvardians staffed" the Restatement project). Kalman also states that "the [R]estatement project may well have represented the final effort to realize Langdell's ideal of a science of law." *Id.*

209. *See* AMERICAN LAW INSTITUTE, *supra* note 38, at 105-07 (listing the organizers and founders of the Institute).

210. *Id.* at 143-99 (listing the Institute leaders, reporters, and advisors during the era of the Second Restatement).

211. La Piana, *supra* note 47, at 1110 ("Root . . . not only trusted in the gradual development of the law to solve the current problems, but he even praised the *bete noir* of the sociological jurist—freedom of contract—as the instrument of the destruction of a society based on status."). La Piana adds that "[h]e was a believer in a theory of law which Pound had labelled an anachronism." *Id.* at 1110-11.

212. *Id.*; *see* AMERICAN LAW INSTITUTE, *supra* note 38, at 11.

213. Simon, *supra* note 107, at 1 ("Wechsler was one of the leading exponents of the [L]egal [P]rocess school that dominated academic law in the 1950s and 1960s.").

214. Cohen, *supra* note 56, at 217 ("The more intelligent of our younger law teachers and students are not interested in 'restating' the dogmas of legal theology."); Franklin, *supra* note 70, at 1368 (describing the "older, more staid jurists" associated with the American Law Institute). Franklin proceeds to state that "[t]hese men, less imaginative than the others, less demonstrative, less conscious that the wasteland [recognized by the scholars associated with Legal Realism] exists, for a decade have been doing the work of the Institute." *Id.*; *see also* Note, *supra* note 21, at 1677 n.57 (noting that the Realists and Critical scholars are both generally "part of the 'younger generation of law'").

215. Cohen, *supra* note 56, at 217-18 ("I think that the really creative legal thinkers of the

Other scholars have challenged this characterization of the Restatements as a Formalist bulwark against Realism.[216] Nathan Crystal has pointed out not only the involvement of leading Realist Arthur Corbin in the Restatement project,[217] but also the fact that other major early Realists conspicuously declined to be critical of the movement.[218] In addition, he has attempted to show that, as a matter of historical fact, the Restatement movement began before Realism became viable as its own school of thought.[219] Ultimately, it is Crystal's conclusion that the Restatements, at least initially, lacked any philosophical bent of their own.[220] In addition, it is probably important to remember the stabilizing, attractive nature of Formalist thought, even in contemporary legal education, and especially in endowing new lawyers with a belief in the power of their chosen profession to effectuate justice.[221] Thus, it may not be appropriate to consign Formalism wholly to the early part of the twentieth century and before.

B. Another View: The Restatements Have Incorporated the Leading Trends in Jurisprudence, Especially in the Second Series

Another, less common, view is that the Restatements are fairly progressive,

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future will not devote themselves . . . to the taxonomy of legal concepts and to the systematic explication of principles of 'justice' and 'reason,' buttressed by 'correct' cases.").

216. Crystal, *supra* note 74, at 245-48. Crystal argues that the Restatement movement, "far from being a reaction to the challenge of [R]ealism, originated before [R]ealism developed as a coherent position." *Id.* at 239.

217. *Id.* at 246 ("The participation of the [R]ealist Arthur Corbin in the drafting of the first Restatements is further evidence that the Restatements were not a response to the attack of legal reformers.").

218. *Id.* at 245 ("Scholars who played a prominent role in the [R]ealist movement did not criticize the commencement of the Restatement project. Herman Oliphant and Karl Llewellyn, for instance, expressed cautious optimism, rather than criticism, of the project."). *See also* DUXBURY, *supra* note 75, at 147 ("Not that every [R]ealist viewed the Restatement project with disdain. Herman Oliphant, for example, apparently without irony, lauded the project as 'truly impressive.'" (quoting Oliphant, *supra* note 158, at 71)).

219. *See* Crystal, *supra* note 74, at 248. ("Realism was not generally recognized as a significant force in the legal community until the famous debate between Roscoe Pound and Karl Llewellyn in 1931."). Crystal thereby concludes that "[t]hus, if anything, the Restatement project seems more the occasion for the formation of the [R]ealist movement than the reverse." *Id.*

220. *Id.* at 246 ("In the beginning, therefore, the Restatement movement was not aligned with either [R]ealism or [O]bjectivism."). Crystal further states that "[t]he first evidence of any alignment occurred in 1925, when Walter Wheeler Cook expressed objection to the concept of 'domicile' in the Restatement of Conflicts." *Id.*

221. Schlegel, *supra* note 21, at 404 ("[F]or all the nascent elite to sleep comfortably, the message must be positive. It need not be panglossian, but to be effective, the message cannot be that more than a few rules need fixing in order to get the system running right. Within this basic intellectual structure operates the history of legal education since 1870.").

especially as they have moved from the first series into the second and third.[222] For example, the American Law Institute has begun, as scholar Gary Minda asserts, to show "new energy and interest in . . . focusing on questions of jurisprudence" in a way that demonstrates increased receptiveness to some of the postmodern schools of thought.[223]

Others have suggested that perhaps the Restatements have been consistently Progressive in the capital "P" sense. The founders' expectation that restating the law would be a continuous process[224] reflects the same belief in dynamism that pervades the Progressive Movement.[225] There is also some evidence that the Institute founders believed the current system of discerning the law was *too* Formalist and were interested in fashioning a more progressive alternative.[226]

The leaders of the American Law Institute have certainly been cognizant of the criticism levied at the Restatement movement. In addition, it seems arguable that the American Law Institute has responded to at least those forms of criticism

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222. But even the first series incorporated the innovative ideas of ground-breaking cases, in some instances, before they became mainstream. Wechsler, *supra* note 3, at 150.

223. MINDA, *supra* note 76, at 251 (noting the "focus on postmodern interpretive strategies" that has been evident during recent meetings of the American Law Institute). Minda defines "postmodernism":

> Today, the term is used by a variety of contemporary academics to signify a new mood or aesthetic in *intellectual* thought. In law, postmodernism signals the movement away from interpretation premised upon the belief in universal truths, core essences, or foundational theories. In jurisprudence, postmodernism signals the movement away from "Rule of Law" thinking based on the belief in one true "Rule of Law," one fixed "pattern," set of "patterns," or generalized theory of jurisprudence.

Id. at 3. This lengthy definition illustrates that Minda's characterization, if ultimately proven to be true, is responsive to many of the critiques historically made of the Restatements.

224. *See* AMERICAN LAW INSTITUTE, *supra* note 38, at 45 ("The work of restating the law is rather like that of adapting a building to the ever-changing needs of those who dwell therein. Such a task, by the very definition of its object, is continuous.").

225. Pound, *Law in Books*, *supra* note 93, at 30 ("This is the condition Professor Henderson refers to when he speaks of the way of social progress as barred by barricades of dead precedents."). Pound states,

> Legal systems have their periods in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence. In a period of growth through juristic speculation and judicial decision, there is little danger of this. But whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, jurisprudence tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules.

Id.

226. AMERICAN LAW INSTITUTE, *supra* note 38, at 17 (containing a critique of Formalism and the Harvard Legal Process school as neglecting the societal causes of law's complexity); *id.* at 65 (containing a critique of the Harvard Legal Process school as creating immaterial factual distinctions in an effort to avoid overruling precedent).

that would not require the Institute to abandon its central organizing purpose. There is some evidence that Herbert Wechsler recognized that the first series of Restatements were not making the greatest possible contribution to the law and that the Institute took steps to ensure that the second series incorporated some of the valid criticism the first series generated.[227] Especially in the second series, the Institute has endeavored to make the Restatements as dynamic as the common law they purport to represent.[228] In addition, the Restatements increasingly have incorporated sociological information regarding matters of particular social concern.[229]

The Institute's responsiveness to progressive critics should not be entirely surprising, given the reformist character of many of the Institute principals. One scholar noted that even Herbert Wechsler, although careful not to designate himself as an interdisciplinarian, seems to have followed the practice of borrowing from other fields.[230] In addition, Geoffrey Hazard, former Director of the Institute, was once executive director of the American Bar Foundation, itself an interdisciplinary organization.[231] Further, according to the characterization of Herbert Wechsler by his colleagues at Columbia in 1978, Wechsler himself cautiously could be described as a Realist.[232] This assertion rings true, in that Wechsler's scholarship and career evidence a belief in law's power to effectuate

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227. Elson, *supra* note 8, at 627-28 ("Herbert Wechsler characterized the first Restatements as 'magisterial pronouncements, limited commentary, taboo in the citation of decisions, exclusion or subordination of all statutory matter and elimination of all the reporters' explanatory results from the official publication, with the exception of important deviations in the Restatement of the Law of Property.'").

228. Dewey, *supra* note 161, at 194 ("[R]ules may . . . become harmful and socially obstructive if they are hardened into absolute and fixed antecedent premises.").

229. Yntema, *supra* note 99, at 461 (noting that the "proposed object was to undertake an exhaustive study of the law of the United States in order to state that law in ideal terms, which should take account of new social needs and at the same time form a common pattern for judicial decision").

230. Sir Leon Radzinowicz, *Appreciation: Herbert Wechsler's Role in the Development of American Criminal Law and Penal Policy*, 69 VA. L. REV. 1, 7 (1983) (noting Wechsler's belief that criminal law "can never be self-contained," but "must draw upon a group of other disciplines such as criminology, psychiatry, the social sciences, history, and politics"). The author goes on to clarify "that the rather shallow term 'interdisciplinary' has never made a deep impression on Wechsler's mind. He believes that the borrowing and assimilations should be accomplished judiciously, in concrete terms and in harmony with the particular needs of the criminal law." *Id.*

231. Geoffrey C. Hazard, Jr., *From the Trenches and Towers: Reflections on Self-Study*, 23 LAW & SOC. INQUIRY 641, 641 (1998) (describing Mr. Hazard's previous experience with the American Bar Foundation, during which time he was responsible for overseeing empirical research).

232. Faculty of Law, Columbia University, *Resolution of the Faculty*, 78 COLUM. L. REV. 947, 947-48 (1978) (providing a tribute to Professor Wechsler upon his retirement, emphasizing both his career as a professor and his distinguished public service during and after World War II, particularly in the Nuremberg trials).

social justice and a conviction that the law should reflect morality and social policy.[233] One could cite Wechsler's involvement in the Nuremberg Trials as evidence of his commitment to pursuing social justice.[234]

Another telling anecdote comes from the obituary of Edward Hirsch Levi, Dean of Chicago Law School and Institute Council member. Levi's technique of pairing lawyers and economists in the classroom was part of what became the "Chicago school" of Law & Economics.[235] Other information suggests that there have been increased recent attempts to incorporate Law & Economics with at least anecdotal success.[236] Thus, it is appropriate to say that the Institute is not monolithically Formalist—nor has it ever been.

Other scholars have taken a slightly different approach in defending the characterization of the Restatements as a progressive enterprise. They suggest that sound judicial opinions incorporate social fact as a matter of course through the liberal education of judges as undergraduates, which is reinforced during their law studies.[237] Corbin, similarly, has suggested that judicial opinions already incorporate social fact more effectively than Restatements could.[238] At least some proponents of the Restatement movement cited this kind of reasoning in preferring the Restatement format to a system of codification.[239] Thus, it may

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233. *Id.* The resolution stated in part,

> Herbert Wechsler's dominant professional interest has been the improvement of American law through systematic application of the powers of reason. His aim has been to point the direction of law reform by careful appraisal of social policy and moral values, by refined articulation of legislative choices, by patient explication of the psychological, administrative, and social realities in which the legal system functions.

Id.

234. *Herbert Wechsler 1909-2000*, A.L.I. REP., Summer 2000 ("From 1944 to 1946," after Wechsler had already become a member of the Columbia law faculty, "he was Assistant Attorney General in charge of the War Division, and his responsibilities included development of the legal framework for trying Nazi war criminals and service as chief technical adviser to the American judges at the Nuremberg Trials.").

235. *See Edward Hirsch Levi, Emeritus Council Member, Is Dead at 88*, A.L.I. REP., Spring 2000 (calling Levi "[a] pioneer in developing interdisciplinary programs at the Law School").

236. *See, e.g.*, Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 434 n.3 (describing the inclusion of Law & Economics concepts in the ALI's Corporate Governance Project). For one scholar's viewpoint that Law & Economics scholars "remain largely aloof from such practical efforts at law reform" as those in which the Institute is engaged, see Farnsworth, *supra* note 185, at 100. Professor Farnsworth's statements may be equally true of Critical scholars.

237. Rheinstein, *supra* note 125, at 695 (noting the trend toward requiring a formal undergraduate education prior to law school admission). Rheinstein states, "In all colleges social studies became a necessary part of the curriculum. The familiarity with social science consequently acquired was carried over in law school into the critical discussion of cases." *Id.*

238. *See supra* note 111.

239. DUXBURY, *supra* note 75, at 60 (describing Roscoe Pound's support of the movement). According to the author, Pound believed,

not have been Formalism that prevented the Institute from focusing on social facts in the Restatements, but rather a sense that doing so would duplicate the internal processes already taking place within the common-law courts.

C. A Safe Compromise? The Restatements as Limited Reform

Yet another view of the Restatement movement is that it has been purposefully and appropriately moderate in its reform efforts. In other words, some have recognized the Institute as an instrument of law reform, albeit a conservative one. As an introductory matter, Professor Lawrence Friedman provides a useful definition of two kinds of law reform: (1) "[A] more or less general revision of the laws, or of some branch of law, in the direction of consistency or systematic arrangement," and (2) "procedural improvement—change in the housekeeping aspects of justice."[240] It is this second form of law reform that Friedman describes as being most common in modern American experience.[241] Thus, perhaps the Institute, as a monitor of the common law, functions much as a common-law court would, making changes that might seem trivial to outsiders but are nevertheless important to those in the legal profession.[242] This perspective is consistent with Natalie Hull's scholarship suggesting that the American Law Institute was created out of a spirit of "pragmatic progressive reform."[243] Similarly, Institute leader Chief Justice Roger

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> As "agents of the common law and allies of the courts," the Restaters "would ensure the dominance of judicial experience in the development of law by relying on "traditional conceptions and traditional categories". . . . The dominance of judicial experience was important to Pound not simply as a means of preserving the continuity of traditional legal forms, but also as an indicator of the moral values of "society at large"; for, like [Oliver Wendell] Holmes, he believed that the courts reached decisions—albeit "seldom consciously"—on the basis of common moral values shared by the community.

Id. (footnotes omitted).

240. Friedman, *supra* note 115, at 351 ("In common speech, the phrase 'law reform' is typically applied to one of two kinds of legal change."). As to the first kind of reform, Friedman states, "This is reform through codification, which has been . . . a 'cardinal vehicle' of reform during the last century of legal history. General codification has not had a happy time in the United States; but codification on a smaller scale has become epidemic." *Id.* (citation omitted).

241. *Id.* at 353 ("Law reform . . . in its usual sense, . . . refers primarily to improvement in the formal parts of law."). "In short, both in the mouths of laymen and lawyers[,] law reform has not necessarily stood for so grand a program as the word 'reform' may seem to promise." *Id.* at 351. Friedman states, "In law as in politics, reform is not revolution." *Id.*

242. *Id.* at 356 ("In the long view of history, it is not surprising that the profession chooses to center its attention on rather technical, craft-oriented problems, to the exclusion of what others see as the more serious problems of society."). Lawyers may also hold a higher opinion of technical reform than outsiders do. *Id.* at 357. As Friedman states, "They may . . . feel that the more elegant and systematic legal system carries with it, in the long run, important values for society." *Id.*

243. POSNER, *supra* note 27, at 303 ("[The Restatement movement] was not, as many have thought, a rearguard action by traditionalists distressed by the rise of statutes and the first stirrings

Traynor has been described as a reformer, albeit not necessarily in the usual sense of that term.[244]

In considering the work of the Institute, it seems important to note the natural conservatism of the law[245] and the way in which this trait might influence lawyers' views on reform.[246] Along the same lines, some have described law reform as being typically external in origin,[247] and perhaps this is even appropriate if the law is to serve the needs of the public.[248] This consideration would suggest that the American Law Institute, being an elite organization and a leader in a conservative field, mirrors at least some of the conservatism of the law it endeavors to restate.[249]

Taking this argument a step further, Lawrence Friedman suggests that the experience of codification and Restatement in American society is an inherently conservative phenomenon.[250] Consistent with his perspective, the Restatements

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of the realist movement."). Posner leaves open, however, the question of whether the Institute is still an instrument of progressive reform in modern times. *Id.*

244. G. Edward White, *Tribute: Roger Traynor*, 69 VA. L. REV. 1381, 1383 (1983) ("Although his political perspective was more 'liberal' than 'conservative,' his principal interest in law 'reform' was that of a technician, anxious to make doctrine more serviceable, predictable, and logically coherent."). White praises Traynor, using words that might also characterize the Institute at its best: "An 'innovative' Traynor opinion conveyed a sense that authorities had been thoroughly canvassed, questions of reach and scope thoughtfully considered, and language carefully phrased. His opinions were academic exercises in the best sense." *Id.* at 1384.

245. A number of sources include the following illustration: "[T]here is . . . a fabulous bird, which, because it abhorred looking ahead, always flew backwards. Yet, strangely enough, in spite of its remarkable habits of locomotion, it managed to survive. This bird, the story alleges, is the law." Goodrich, *supra* note 39, at 508 (reflecting the symposium comments of Hessel Yntema); Abrahamson, *supra* note 32, at 7 (giving the same illustration).

246. CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT 201 (1981) (noting the natural conservatism of the law and lawyers' collective fear that codification would create poor substantive changes).

247. Friedman, *supra* note 115, at 353 ("Demands for legal change are frequently, even typically[,] exogenous. They come from concrete interest groups, from the government bureaucracy, even (sometimes) from that vague, sponge-like mass called 'public opinion.'").

248. *Id.* at 367 ("Major change, change that takes power from one class and hands it over to another, cannot be achieved through ordinary litigation and through the ordinary work of private practitioners. Major change takes place through law, but hardly through lawyer's law in its usual sense; it takes place through programs of towering scope, which are legislative and executive in origin . . . . [T]he organized body of lawyers has no mandate to destroy or utterly transform existing law.").

249. The early writings of the Institute reflect this view of the law. AMERICAN LAW INSTITUTE, *supra* note 38, at 77 (suggesting that "the conservatism of lawyers" has contributed to the increase of gamesmanship in the law at the expense of sense and justice).

250. Friedman, *supra* note 115, at 354. Friedman states,

> Both codes and [R]estatements were reforms that did not reform. In the 19th century, law was constantly and vigorously changing; every new statute was in a sense a reform;

espouse a relatively modest agenda—to promote certainty and a lower degree of complexity in the law. [251] Taking this logic a step further, perhaps law is not just conservative but actually more conservative than other disciplines and professions. Roscoe Pound and Karl Llewellyn suggest that jurisprudence has been slower to recognize the contributions of sociology than have other fields.[252] Pound also asserts that, because the law is resistant to change, there is a frequent gap between law and public opinion.[253] This viewpoint is not, however, uncontroversial: Max Rheinstein advances a much more radical view of the lawyer's role in American society.[254]

> so was every new doctrine and ruling. The codesmen were interested in reform in a special sense. They wanted to perfect an existing system. They wanted to make it more knowable, harmonious, certain. Drastic shifts in allocation of political or economic power, through law, were not to their purpose.

Id. Friedman describes this kind of conservative codification as the "spiritual parent[] of the [R]estatements of the law." *Id.*

251. COOK, *supra* note 246, at 12 (providing a compelling description of uncertainty as a significant problem in the pre-Restatement era and of codifications such as the Restatements as promoting modest reform).

252. Pound, *Law in Books*, *supra* note 93, at 31 ("Jurisprudence is the last in the march of the sciences away from the method of deduction from predetermined conceptions."). Pound is also concerned that law students quickly forget the importance of the education they received before law school. This statement, if true, would tend to suggest that lawyers are trained not to consider anything that is deemed to be beyond the bounds of the law. *Id.* Pound states, "[T]he natural law theories which are a matter of course in all our law books are not unlikely to persuade [a new law student] that what he learned in college is immaterial in the domain of law." *Id.* *See also* Llewellyn, *A Realistic Jurisprudence*, *supra* note 138, at 57 (describing law as "the most conventionalized and fiction-ridden of disciplines").

253. Pound, *Law in Books*, *supra* note 93, at 42 (stating that "law has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning"). Pound states, "This is an inherent difficulty in legal science, and it is closely connected with an inherent difficulty in the administration of justice according to law—namely, the inevitable difference in rate of progress between law and public opinion." *Id.*; *see also* Llewellyn, *Some Realism*, *supra* note 56, at 72 (noting the general Realist "conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve").

254. Rheinstein, *supra* note 125, at 688. Rheinstein states,

> The words of Rudolph Wietholter recently reminded me of the diversity of legal styles: "We do not have to harbor any fear that members of the legal system will bring about a change of the social order. Quite the contrary, society is being stabilized and the status quo is maintained primarily by means of the law and the lawyers."
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> As to Germany, this proposition may contain a grain of truth. For a considerable period it also would have been applicable to England. But it certainly does not apply to the United States or, to speak more correctly, to the present third phase of the legal development of the United States.

In addition, scholars disagree as to whether legal academia promotes conservatism or encourages reform. Alfred S. Konefsky and John Henry Schlegel describe the law-school reward structure as promoting conservative scholarship that creates no danger of systemic reform.[255] Alternatively, Lawrence Friedman suggests that law professors are more receptive to wide-ranging reform than other members of the law profession might be.[256] This debate is particularly pertinent to those who, like Rheinstein, see law professors as leaders in the development and reform of the law.[257]

Regardless of why the Restatements have adopted their current form and philosophy, many scholars have recognized that the work of the American Law Institute through the Restatement movement is truly valuable, even if it represents a more limited kind of reform than some observers would prefer.[258] It is clear that the Institute founders believed they were doing something that was not only important, but crucial.[259]

Id.

255. Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833, 849 (1982) ("One possible explanation for the lack of original thinkers is that the reward structure within the law school is incompatible with serious scholarship."). Instead, the authors claim, "Teachers are chosen on the assurance that they will bear their share of the enormous class loads and participate in professional (read 'safe') law reforms, bringing conservative bar support to the institution." *Id.*

256. Friedman, *supra* note 115, at 356 ("The higher the prestige of the professor, the more likely he is to engage in law reform. No one seems to regard law reform as trivial or beneath the dignity of endowed chairs of law.").

257. Rheinstein, *supra* note 125, at 690-91 (following the Civil War, Rheinstein describes a "change from material-rational to formal-rational thinking," which he connects "with the rise of a new group of co-leaders of the law, the academic teachers and scholars—the professors").

258. Posner recommends a different kind of limited reform effort:

> The simplification of law was one of the Institute's original goals, and it is one that would be well served by the Institute's undertaking to monitor the thousands of appellate decisions, state and federal, handed down every year for conflicts on technical points of law and to propose solutions that I predict would be welcomed by courts and legislatures.

POSNER, *supra* note 27, at 308-09. I explore this potential mission for the Institute in another article. *See* Kristen David Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice?*, 32 S. ILL. U. L.J. (forthcoming 2007) (Part III.B., "Proposals Motivated by Increased Pressures on the Courts").

259. AMERICAN LAW INSTITUTE, *supra* note 38, at 11 (quoting the recommendations of the committee that was formed to organize what became the Institute). The committee's recommendations included the following statements:

> [T]he opinion that the law is unnecessarily uncertain and complex, that many of its rules do not work well in practice, and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions.

As Nathan Crystal notes, "Evidence indicates that uncertainty of the law was a significant problem. Statistics gathered by the ABA showed that approximately fifty percent of the cases which reached appellate courts were reversed."[260] George Wickersham notes concern for the sheer volume of reported case law, dating back to at least 1821.[261] Warren Seavey describes the American lawyer, by the nineteenth century, as being "overburdened by the mass of material flowing from the presses,"[262] rendering the true state of the law very difficult to discern. Samuel Williston provides a similar picture, citing statistics on the

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> It is unnecessary to emphasize here the danger from this general dissatisfaction. It breeds disrespect for law, and disrespect for law is the corner-stone of revolution.

Id. Elsewhere, the founders expressed their concern that lack of faith in the outcome of legal matters motivated many litigants to compromise matters rather than entrusting them to the court system. *Id.* at 15 (describing "the feeling [among litigants] that the outcome of all court proceedings is uncertain no matter how just the claim").

260. Crystal, *supra* note 74, at 249 ("Some judges and writers complained that it was difficult to determine what the law was. Others complained that the legal system was unnecessarily complex."). The Institute was particularly concerned with situations in which identical or near-identical statutes were interpreted in varying ways, much to the confusion of the bar. AMERICAN LAW INSTITUTE, *supra* note 38, at 81. The Institute founders believed that these "accidental variations," unlike purposeful variations in the law, contributed little to the development of the law. *Id.* ("Conflicting judicial interpretation of like statutory provisions has rarely any compensating good effect to offset the resulting uncertainty and complexity."). I discuss this potential mission for the Institute in another article. *See* Adams, *supra* note 258, at Part III.A ("Proposals Motivated by the Rise of Statutory Law").

261. Wickersham, *supra* note 66, at 450-51 ("Mr. Justice Story, in an address to the bar of Suffolk County, Massachusetts, in 1821, referred to 'the mass of the law' as accumulating with an almost incredible rapidity, and said, 'it is impossible to look without some discouragement upon the ponderous volumes which the next half century will add to the groaning shelves of our jurists.'"). A colorful quote from the report recommending the founding of what became the Institute reflects a similar perspective: "In England in the old days [legal] literature was a scanty rivulet. In England and her Colonies it has swollen in modern times to a stately stream. But in America it has become a raging torrent fed by hundreds of tributaries." AMERICAN LAW INSTITUTE, *supra* note 38, at 66. The report notes, "It is of course impossible for any individual lawyer or judge to read, still less by any device to carry in his mind, one one-thousandth part of this mass of case law." *Id.* at 67.

262. Seavey, *supra* note 52, at 317. The author continues:

> Search books helped, but finding cases was merely the beginning of [the lawyer's] work of synthesizing them. The treatises were helpful, but they were the products of individuals of varying capacity and their statements were far from authoritative. The profession yearned for a court of final resort, like the House of Lords which never knowingly changes a once-stated opinion, or a code like that of Justinian, authoritative and so clearly expressed that there could be argument only as to the application of the rules to the facts.

Id.

proliferation of the case law.[263] This phenomenon, coupled with the inevitable contradictory opinions that were generated, made it difficult to determine how a court would rule in any given case.[264] Businesses became frustrated at the inability to plan resulting from this situation.[265] In addition, the confused state of the common law ultimately weakened the value of citations to precedent in legal arguments.[266] Arthur Corbin cited the "[u]ncertainty of mind," "confused reasoning," and "actual conflict in decision" that were common problems at the time.[267] Wesley Newcomb Hohfeld shared the consistent view that unclear legal terminology and inconsistent use can easily result in unclear law.[268]

It was this crisis, whether perceived or real, to which the American Law Institute was attempting to respond through the creation of its Restatements and which it continues to address in modern times. Along the same lines and recognizing the criticism directed at the Restatement movement, some express a concern that the Institute's Restatements may be abandoned by young scholars in favor of what might be perceived as more prestigious scholarship.[269]

The opposite viewpoint is that the Restatement movement is too conservative to be useful, in that the American Law Institute failed to take the more significant courageous steps that would be required for meaningful results. In addition, Hessel Yntema has argued that the Restatements have failed to meet even their more modest stated goal of relieving the attorney's burden of sorting through

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263. Williston, *supra* note 118, at 40 (noting the increase in American Law Reports from 1885 to 1914 to 1928, from 3500 to 8600 to over 11,000). Williston described the increase as being more than should be attributed simply to the addition of new states. *Id.*

264. Wickersham states, "[W]ith the swelling volume of precedent, the task of ascertaining what the law is in any given case has grown formidable." Wickersham, *supra* note 66, at 455.

265. *Id.* at 455 ("People demand to learn what is the law, not as the result of a law suit, but while actual litigation is yet afar off. They are not content to rest on a bare probability of the judgment which a [c]ourt of justice may apply to their acts.").

266. *Id.* at 457 ("This 'avalanche of decisions by tribunals, great and small,' Judge Cardozo has truly said, 'is producing a situation where citation of precedent is tending to count for less and appeal to informing principle is tending to count for more.'" (citation omitted)).

267. Corbin, *supra* note 37, at 19. Corbin describes an era in which "[i]t was apparent that whatever authority might be found for one view of the law upon any topic, other authorities could be found for a different view upon the same topic." *Id.* at 21 (describing "a situation where the law was becoming guesswork" (citation omitted)).

268. Wesley Newcomb Hohfeld, *Some Functional Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), *reprinted in* AMERICAN LEGAL REALISM 45 (William W. Fisher et al. eds., 1993) ("[I]n any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression."). The author goes on to note, "[T]he above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions." *Id.*

269. Goodrich, *supra* note 39, at 496 ("[W]e shall make a mistake so grave as to be catastrophic if a generation of law teachers appears which is afraid to do orthodox work in the law for fear of being thought old fashioned.").

reported case law.[270] Thurman Arnold compares the Restatements in this way to the Hilary Rules of pleading, which ultimately became disfavored, describing both efforts as being well-intentioned, inevitable, and ultimately misguided because greater change was needed.[271] Nevertheless, the author admits, "From the point of view of a science *of* law, the Restatement by the American Law Institute is as near perfection as human things can make it."[272] A similar critique is that the Restatements fail to be helpful because their provisions are largely obvious.[273] Another criticism is that the Restatements, being a creature of committee drafting and compromise, tend naturally to present law that is "not in force anywhere."[274] Furthermore, Oliver Wendell Holmes disputed the characterization of the law as being too vast to be knowable,[275] a point that would

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270. *Id.* at 506 (reporting the opinion of Hessel Yntema that "the influence of the Restatement of the Law in alleviating the defects in the legal system thus far is negligible"). Yntema elaborates:

> Assuredly the burden of the mass of the law has been increased rather than lessened to date by the Restatement and the related legal literature. The flow of judicial decisions continues unabated. The complexities of legislation have magnified rather than diminished during the past decade. There are more law reviews to be examined than ever before. The stream of jurisprudence has not been stopped by adding to its waters.

Id.

271. Arnold, *supra* note 119, at 819 ("[I]t was probably inevitable that the same sort of thing attempted by the Hilary Rules in procedure should have been repeated by the American Law Institute in substantive law. The idea that the old system was perfect and needed only clearness and accuracy on the part of lawyers and judges was so fixed that had anything else been tried it would not have obtained even a scattering support."). The author goes on to state, "Of course the Hilary Rules did not stop the great pleading inflation, nor has the Restatement stopped the great post-war substantive law inflation. It has become another book which must be consulted, while the cases and texts pour out as before." *Id.*

272. *Id.* at 816 (noting that "[t]hey have employed the most distinguished experts available and submitted the results to the most distinguished practical lawyers").

273. DUXBURY, *supra* note 75, at 148. The author gives the following support for this assertion:

> Even William Reynolds Vance, one of the most conservative legal scholars at Yale during the 1930s, was prepared to denounce the Restatement of the Law of Property as a series of "solemn declarations . . . so obvious that they are rather ludicrous. . . . The judge who would base his decision of any question of law upon these black letter declarations would be worse than lazy; he would be incredibly stupid."

Id. (citation omitted).

274. Milner, *supra* note 26, at 798 (having already criticized the Institute as allowing the over-dominance of reporters, the author adds, "[E]ven if the advisers sometimes managed to convince the Reporter of the error of his ideas, the result would far more likely be the striking of a balance, than the Reporter's sliding down to the other end of the academic see-saw. With such a compromise, taking two extreme points of view into account, we then arrive at the delightful conclusion that the particular 'rule' is one which is not in force anywhere.").

275. Holmes, *The Path of the Law*, *supra* note 21, at 16 ("The number of our predictions when generalized and reduced to a system is not unmanageably large."). Holmes states, "They present

tend to call into question the assumption that a Restatement is even needed, much less valuable. Thus, the value of the Institute's Restatements can be disputed.

Lawrence Friedman takes a more moderate approach in critiquing the Restatements. To the extent that the Restatements represent a hybrid of what Friedman calls "half ratification, half real inducement to change,"[276] he acknowledges that this kind of reform is "not only typical of the work of Anglo-American courts; it is arguably the most vital and productive kind of change."[277] Additionally, he argues that even reform that is merely "ratification" may be valuable in improving the public perception of lawyers.[278]

The question remains whether it would even be possible for a law-reform effort to incorporate all of the criticism that has been levied at the American Law Institute and the Restatement movement by scholars in Legal Realism, Law & Economics, and Critical Legal Studies and maintain a useful level of coherence. The Realists, while often sharply critical of the American Law Institute, seemed to lack a clear sense of what would be a better alternative.[279] Neil Duxbury suggests that the reason for this failure to suggest another model could be the ultimate similarity in goals between the Realists and the Restaters. Thus, despite their critique, the Realists may not have been able to envision a better program than the Institute produced.[280] Arthur Corbin acknowledges the failings inherent

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themselves as a finite body of dogma which may be mastered within a reasonable time. It is a great mistake to be frightened by the ever increasing number of reports." *Id.*

276. Friedman, *supra* note 115, at 363 ("Formal legal change often comes at the middle point in a social process which requires a number of distinct steps for its completion. Formal legal change ratifies those steps already taken, but it forces or hurries society along with regard to the steps not yet taken.").

277. *Id.* at 364 ("Very generally, an attempted legal change, in a non-revolutionary setting, will have most effect and be most meaningful when the change is relatively slight.").

278. *Id.* at 358 (describing law reform as "a banner of rectitude waved in the public eye"). Friedman goes on to state, "The profession . . . finds it valuable to blunt the edge of popular distrust through mounting its own war against injustice." *Id.*

279. STEVENS, *supra* note 74, at 141 ("The alternatives offered by the Yale critics [associated with the Realist movement], whether in terms of intellectual or pedagogical goals, were largely nonexistent.").

280. DUXBURY, *supra* note 75, at 149 ("[A]s with the treatment of Langdellian legal education generally, one finds in the literature of [R]ealism a reluctance to develop critique of the Restatements into solid proposals for reform."). The author continues:

> Possibly this reluctance stemmed from the fact that, for all the [F]ormalist underpinnings of the Restatement movement, one of its primary goals—the simplification of the common law—rather echoed the general [R]ealist disdain for legal verbosity and word magic. Fred Rodell, for example, wondered why legal documents lack the plainness of language of cook-books, almanacs or columns of classified advertisements: surely, he reasoned, it must be possible "to cut through those layers upon layers of verbal varnish and bare the true grain that lies beneath." Such a sentiment would not have been out of place at the Harvard Law School, which he so despised. The [R]estaters too, after all, were trying to uncover the true grain of the law.

in a black-letter system of law, but he goes on to suggest that no better form is available.[281] Early Institute Director Herbert Wechsler seems to have considered the models used by other disciplines such as science, but ultimately concluded that no other fields offer clearer answers.[282] It is also important to note that no school of thought, including Law & Economics, is universally recognized as valid; Law & Economics, for example, has been criticized as a false science lacking empirical support.[283]

Returning to the Realist claim that rules don't wholly guide judges and assuming that, instead, analysis is relatively flexible, some fundamental questions remain.[284] What is an appropriate response to this conclusion? Should the Institute abandon rules completely? What would be a better system than one based on rules? In addition, returning to the Realist thesis that working rules are more useful than black-letter rules,[285] is this just a simple manner of labeling, such that a mild disclaimer or change in terminology could cure the entire problem? If not, how could the criticism be addressed?

Both Realism and Critical theory have been criticized for lacking a positive thesis. This phenomenon has made it very difficult to conceive of a way in which the Institute—or any other policymaking group—could implement a positive program that incorporates the wisdom of each movement.[286] Instead, as one scholar noted, the kind of pure criticism that Realism and Critical theory

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Id. Warren Seavey similarly reports that the Restatements were intended to be written without "academic phrasing." Seavey, *supra* note 52, at 317. Seavey continues:

> Ambiguous Latin phrases like *res ipsa loquitur* and *respondeat superior* were taboo, except for apology and explanation in good English. For the phrases "in general" and "in most instances," favorites in the old days of easy writing, there had to be substituted the conditions under which a rule would operate, for a statement of law with unstated exceptions is not a rule.

Id. at 318.

281. Corbin, *supra* note 37, at 29. Corbin states,

> A black letter statement that is finally adopted may still be found to be made up of variables and modes of expressions that may have had their origin on the tower of Babel; but they have the merit of being the survivors in a struggle with other forms of expression that almost invariably are worse.

Id.

282. Simon, *supra* note 107, at 10 ("In [their] 1937 Columbia Law Review articles, Wechsler and Jerome Michael had devoted innumerable footnotes and whole sections to discussing the human sciences, but with the upshot of tracing a model of criminal law dependent not on the positive knowledge of science but precisely on its uncertainty.").

283. BAUMAN, *supra* note 23, at 240.

284. *See supra* note 139.

285. *See supra* note 141.

286. Neacsu, *supra* note 23, at 426-33 (discussing the splintering of the Critical movement). The author concludes that "it seems [the] CLS failed or refused to provide a coherent radical vision of social change." *Id.* at 428. As a result, the author states, "CLS no longer seems to possess a voice comprehensible to anyone outside its own small circle." *Id.* at 416.

have provided is ultimately only destructive and thus difficult to incorporate.[287]

In addition, neither Critical theory nor Realism clearly represents the leading ideas in jurisprudence. As Professor Robert Ellickson has noted, even theorist Duncan Kennedy has said the Critical movement has ended.[288] One reason for this demise could be that the movement failed to secure the support of practicing lawyers.[289] Critical theory was not necessarily intended to be merely theoretical. Instead, there is some evidence that the movement was meant to be transformative, not just ideological, but it has failed to take this second step.[290] It may be the very indeterminacy that characterizes Critical scholarship that keeps it from being able to propose a coherent alternative.[291] The movement has also been greatly harmed by its own internal divisions.[292]

Similarly, Realists are criticized as being unable to agree on a positive model for the role of law.[293] Unlike Realism and Critical theory, Law & Economics presents a coherent positive program.[294] This program has also resonated with

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287. Note, *supra* note 21, at 1683 ("Engaged in labyrinthine textual explorations easily dismissed as the interpretive idiosyncrasies of individual writers, the [C]ritical legal scholars might find themselves increasingly segregated from both their academic contemporaries and the political realities to which their scholarship is addressed.").

288. Ellickson, *supra* note 96, at 340 ("In law journals the rate of citations to CLS work fell by roughly one-half between 1988-1990 and 2000-2002. By 1996, Duncan Kennedy, previously CLS's pied-piper-in-chief, was asserting that the movement was 'dead.'"). Ellickson went on to state, in describing the reasons for the demise of Critical theory, that "postmodernism becomes a laughingstock when it lapses into total nihilism about the possibility of factual knowledge." *Id.* at 341.

289. *See* Schlegel, *supra* note 21, at 403. This statement, if true, begs the question of how the Institute should include Critical scholars in its work, which is intended to be of great practical use to practitioners and judges.

290. David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 591 (1984) ("While Critical legal scholars seek to show relationships between the world views embedded in modern legal consciousness and domination in capitalist society, they also want to change that [tradition] . . . . [T]he analysis of legal consciousness is part of a transformative politics."). Trubek further acknowledges that this aspect of Critical theory's potential has not been wholly understood, much less realized in practical effect. *Id.*

291. Solum, *supra* note 149, at 463 (examining and ultimately agreeing with the notion that focus on indeterminacy prevents CLS from having a clear program to offer). Solum states, "The skeptical possibilities invoked by both rule-skepticism and epistemological skepticism are not practical possibilities, and only practical possibilities affect the way one acts." *Id.* at 479.

292. *See* BAUMAN, *supra* note 23, at 18 (describing the fragmentation of Critical theory into Critical Race Theory, Feminist Jurisprudence, Modernism, and other groups).

293. *See* Milner, *supra* note 26 (comprehensively criticizing the Restatements but failing to present a coherent alternative); *see also* AMERICAN LEGAL REALISM, *supra* note 21, at 165 ("[T]he weakness of [the Realists'] affirmative program contributed significantly to the deterioration of the movement in the early 1940s.").

294. Ulen, *supra* note 91, at 436-37 (noting the greater success of Realism in presenting a negative thesis than a positive alternative).

non-academicians in some important ways—for example, many judges have attended the Law & Economics Center at George Mason.[295] At the same time, and by way of contrast, the lack of a clear program makes it less likely that there could be any such center for studies in the Realist or Critical movements.

Thus, it remains unclear how the Restatements could incorporate the best lessons of Realism and Critical theory. At the same time, if Law & Economics has proven itself to be particularly useful to judges,[296] perhaps the Restatements should be more responsive to the developments and jurisprudence in this area. Even so, there are risks of going too far, since Law & Economics has been criticized as reifying the market-based nature of law with few proven empirical results.[297]

In addition, Realists and others have called repeatedly for greater empirical study in law, suggesting that doing so will effectuate a significant, substantive difference in the law thus created.[298] John Henry Schlegel describes Charles Clark's attempt to study empirically "[t]he actual effect of procedural devices on the progress of litigation,"[299] which included a planned collaboration whereby the American Law Institute would publish the final results.[300] Ultimately, the Institute did publish the research, but only in a version that was "virtually devoid of any conclusions or interpretive material."[301] The reporting of this incident in

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295. Brock, *supra* note 95, at 203 ("Over 350 federal judges have attended the Law and Economics Center at George Mason University[,] and the Department of Justice has sponsored economics short-courses for over 100 federal judges.").

296. *Id.* at 205 ("[T]here appears to be an emerging consensus among academics familiar with [Law & Economics], that to be a literate judge capable of adequately understanding legal issues and questions, a working knowledge of economics is essential.").

297. Kritzer, *supra* note 41, at 669 ("Economic analyses of law and the legal system have been largely theoretical with relatively little in the way of good empirical results to show the validity of the theoretical arguments."). Kritzer adds, "Theory is important because it suggests questions and avenues for inquiry. Untested theoretical propositions, whether derived from economic analyses or some other disciplinary approach, are at best a start. It is an understanding of the actual workings of legal principles and legal procedures that is ultimately needed." *Id.*

298. *See supra* notes 99-103 and accompanying text.

299. SCHLEGEL, *supra* note 43, at 84-85 (Clark planned "to take the field in Connecticut in the effort to discover how the administration of justice is working." (citation omitted)).

300. *Id.* at 90 (describing the "complicated arrangement" between Clark and the American Law Institute). The agreement was to proceed as follows:

> The agreement required approval first by a committee of the ALI Council consisting of two members of the [National Commission on Law Observance and Enforcement] and Judge Learned Hand, then by the Council, and finally by the [American Law Institute] membership—a process so full of potential traps that it plainly left Clark worried.

Id.

301. *Id.* at 94 ("This action had the support of William Draper Lewis, executive director of the American Law Institute, who was as worried as Clark about the problems of getting any conclusions approved by his diverse membership." (citing letter from William D. Lewis to Charles E. Clark (Mar. 3, 1933) (on file with the Beinecke Rare Book Library, Yale University))).

Schlegel's text, *American Legal Realism and Empirical Social Science*, is meant to show the Institute's failings with regard to empirical legal research. Schlegel has also criticized the American Law Institute as failing to use its considerable resources to support empirical study when it had the opportunity to do so.[302]

This is probably not as clear a point as Schlegel suggests, however. Evidence suggests that the Institute leadership has long been aware of the potential benefits of empirical study but has chosen to use its resources elsewhere, based primarily upon the limitations of institutional resources and the considerable time and expense associated with high-quality empirical work.[303] In fact, historical documents suggest that the Institute, from its very inception, had planned to engage in empirical study to support its Restatements.[304]

Some have acknowledged the particular difficulty of empirical research in the field of law.[305] In addition, the Institute's cost estimates on the proposed Kritzer empirical study[306] referenced earlier in this Article showed the estimated

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302. Schlegel notes, as a preliminary matter, that the American Law Institute and the Johns Hopkins Institute of Law, which was founded to support empirical research, shared a common concern for "the growth in legislation and judicial decisions that together led to 'existing confusion.'" *Id.* at 152. He goes on to state, in explaining why Realist scholars were not more prevalent in the American Law Institute in its early days,

> The enormous American Law Institute scholarship engine had already been set in motion, its wheels well greased with money that might have been captured for empirical research in law, but that instead lined the pockets of more traditional legal scholars. That organization provided now tax deductible opportunities for slightly left of center, upper caste lawyers to socialize in an atmosphere that reinforced the notion that theirs was a learned profession and thus further separated them from the stench of the *Untermenschen* of the profession. Even more debilitating was the notion fueled by the ALI's mere existence that library, not field, research was *the* method of legal research among the group in the profession that was the most likely to support empirical research in law.

Id. at 212.

303. Traynor, *supra* note 59 (describing various considerations with regard to empirical study and ultimately recommending that the Institute consider making good use of the excellent empirical work sponsored by other organizations, such as the American Bar Foundation and the RAND Institute for Civil Justice).

304. Yntema, *supra* note 99, at 465 ("The initial plan [for the Institute] contemplated an ideal statement of law, analytical, critical, and constructive, embodying whatever improvements in the law itself might be recommended by exhaustive study.").

305. AMERICAN LEGAL REALISM, *supra* note 21, at 233 ("Some scholars labored mightily at empirical research, only to find conclusions elusive, their hard-won data so incomplete as to be unpublishable, their work useless for suggesting reform."). *See also* Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1933), *reprinted in* AMERICAN LEGAL REALISM 265 (William W. Fisher et al. eds., 1993) (relating the much-maligned New Haven empirical traffic study).

306. *See generally* Kritzer, *supra* note 41.

cost would probably be at least half a million dollars, maybe more.[307] Furthermore, it is important not to characterize empirical study as having been universally embraced; Critical scholars, for example, are not wholly supportive of this approach to the study of law.[308]

In addition, although the Institute is often criticized for failing to communicate coherently the "is/ought" distinction in its Restatements, it is not clear that the distinction is one that is ultimately itself coherent.[309] Herbert Wechsler has suggested that the Institute cannot separate *is* from *ought* because courts consider what the law *ought to be* in deciding what the law *is*.[310] Perhaps the Institute members do, too, when the Institute chooses to adopt a minority rule in a Restatement product. Critical scholars, likewise, reject the distinction between what the law is and what it should be.[311] Alan Milner shows how the Restatements changed over time in this fashion, from the first series to the second, from stating the law that is to the law that ought to be.[312] While Herbert Wechsler suggested that the distinction has been overplayed,[313] Felix Cohen went

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307. Hazard, *supra* note 231, at 641 (comparing estimates for the proposed research and referencing Hazard's experience in supervising similar empirical studies as executive director of the American Bar Foundation).

308. Trubek, *supra* note 290, at 579 (asserting that some Critical scholars "express hostility towards empiricism because they think it is associated with determinism and positivism"). Trubek goes on to assert that empiricism can, and often does, have an appropriate place in Critical scholarship. *Id.* at 586 ("[T]here is no reason to identify nondoctrinal methods of research in legal studies with positivist determinism.").

309. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931), *reprinted in* AMERICAN LEGAL REALISM 59, 61 (William W. Fisher et al. eds., 1993) ("One of the conspicuous actualities of the legal order is the impossibility of divorcing what [courts, lawmakers, and jurists] do from the question what they ought to do or what they feel they ought to do. For by and large they are trying to do what they ought to do.").

310. Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185, 190 (1968) ("And if we ask ourselves what courts will do in fact within this area, can we divorce our answers wholly from our view of what they ought to do, given the factors that appropriately influence their judgments, under the prevailing view of the judicial function?").

311. Trubek, *supra* note 290, at 596 ("This distinction . . . is incoherent to anyone who accepts, as I do, the vision of knowledge and politics on which CLS is based.").

312. Milner, *supra* note 26, at 812-13 ("The Restatements' approach first proceeded solely on the basis that the law (decisions) of the past would be perpetuated and simply mirror the law (decisions) of the future, apparently without regard to community policy, the innovations of future judges or, indeed, any rational appreciation of the utility of the decisions in changing conditions. Later, the approach was partially abandoned, with the realization that the criterion of 'law as is' was one 'the limits of which were, in the nature of things, somewhat elastic.'" (citation omitted)).

313. Hardy Cross Dillard, Comment, *Herbert Wechsler*, 78 COLUM. L. REV. 953, 954 (1978) (lauding the "forward-looking and creative approach [Wechsler took] to the work of the American Law Institute"). Dillard clarified:

I refer in particular to the way in which he and the [American Law Institute] Council

a step further, expressing his opinion that what courts *ought* to do is irrelevant.[314]

And finally, perhaps the Restatements assumed their current form and mission because broader reform was deemed too dangerous to the legal profession. Thurman Arnold goes so far as to intimate that more comprehensive law reform could have "destroy[ed] the independent universe of the law."[315]

Contemporary legal thought continues to make a place for classical theory, conservative though it is and antiquated though some call it. Traditional legal education and the case method have been described as essential to the identity of the modern law teacher and the American law school.[316] In addition, it may seem hard to imagine a legal system that does not generate new lawyers who believe in the power and coherence of the law. Thus, it may still make sense for legal education to espouse Formalist thought, though enriched with Critical and Realist perspectives.[317]

Understanding the historical context in which the Restatements have been prepared may also be important to evaluating their degree of success. As the Great Depression began, William Draper Lewis proudly announced in the American Bar Association Journal that the American Law Institute had reached the "advanced stage of its great work."[318] The fact that the Restatement project was not derailed by the Great Depression is itself at least a modest success, even more so because the Institute depended on public financial assistance for the project.[319] There is yet another way in which historical context may be crucial to understanding the decision of the Institute founders to pursue what may now appear to some to be too-modest reform: G. Edward White suggests that the

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> have responded to those who would sanctify the "black letter" of the Restatements by making too dogmatic and simplistic a distinction between the law that *is* and the law that *ought to be*, as if the former were always a fixed datum rigorously separated from the latter.

Id. (emphasis in original); *see also* Wechsler, *supra* note 3, at 149 (asserting that Fred Helms and others who have criticized the Restatement movement have exaggerated this distinction).

314. Cohen, *supra* note 56, at 220 ("For the [R]ealist, . . . law in general . . . is a function of legal decisions. The question of what courts *ought* to do is irrelevant here.").

315. Arnold, *supra* note 119, at 824 ("The small problem of legal inflation which the American Law Institute strove to deal with so sincerely, so gallantly and so ineffectually, could easily respond to practical treatment, if it were not for our fear that such practical treatment would destroy the independent universe of the law.").

316. Konefsky & Schlegel, *supra* note 255, at 844. ("[I]n the case method is found both the distinctiveness of and protective coloration for the modern American law teacher. It informs his identity as a teacher and scholar whose method is unique, and at the same time allows him to be just one of the boys at the faculty club.").

317. *See supra* note 220 and accompanying text.

318. William Draper Lewis, *American Law Institute Reaches Advanced Stage of its Great Work*, 16 A.B.A. J. 673 (1930).

319. *Id.* at 674 ("This lesson is that the members of a public profession like the Law, if they vision a worthwhile and great public service, and are willing to give time and labor to its realization, will receive from the public the necessary financial co-operation.").

academicians of World War II times—which would include, of course, many of the Institute founders—needed to maintain their belief in the power of law, so as to stave off fascism.[320] The rule-aversion that characterized Realist thought arguably became less attractive as the United States faced the rise of totalitarian regimes.[321] Instead, conservative reform efforts such as the Institute's may have appeared increasingly compelling.

Others have suggested that, when the Institute was founded—that is, in the middle of the Progressive era—the law was seen as anti-reform to outsiders,[322] and at the same time the law was also trying to create and protect its own identity as a distinct profession.[323] The Progressive era was thus the genesis of professional law teachers and professional law education.[324] Both dynamics may have contributed to the development of the Restatements in their current form, as a kind of "safe, conservative reform."[325] This was also the period of transition

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320. White, *supra* note 244, at 1385. This somewhat lengthy quote makes the author's point:

> [A] number of able jurists of [Chief Justice Roger Traynor's] generation—the generation that came to maturity during World War II—made a firm link in their jurisprudence between intellectual competence and moral legitimacy. The linchpin words for those jurists were words like "craftsmanship" or "reasoned elaboration," words that suggested that if a judicial opinion met professional standards of clarity, internal coherence, and logical reasoning, then it was necessarily "right."

Id. (adding, "It was important for Traynor's generation to make law a rational, moral force for justice, a bulwark against totalitarian oppression."). White goes on to show how time has changed scholars' perspectives on this matter, by making allusion to the lessons of the Critical movement and the Civil Rights Era:

> [I]n the years in which my generation has come to maturity there have been some powerful testaments to the capacity of legal reasoning to distort reality and to evade moral issues. When "the tools of one's craft" can function as euphemistic weapons to disguise one's motivations and to paper over one's blunders, one can hardly claim that intellectual coherence and moral integrity are one and the same.

Id.

321. Note, *supra* note 21, at 1676 n.54 ("G. Edward White suggests that the Realists' retreat was [in part] occasioned by the rise of totalitarian regimes in Europe, a development that made the Realists' relativistic approach to morals unpalatable to the general community.").

322. La Piana, *supra* note 47, at 1087 ("[T]he legal system and the legal profession were to a great degree out of step with the progressive elements of society because they appeared to be obstacles to the most broadly accepted goal of Progressivism, social justice.").

323. *Id.* at 1090 (citing "the desire to solidify the place of the legal expert in a changing society").

324. Franklin, *supra* note 70, at 1370. The author states,

> In the United States, the law school has developed only within the very recent past, indeed, not before 1870, with the accession of Mr. Langdell to the Harvard deanship, and even at Harvard it may be suspected that a tradition of the professional law teacher was not firmly established before the turn of the century.

Id.

325. La Piana, *supra* note 47, at 1093 ("After an address on the subject in 1884 by Judge John

from reception of English law to the development of an authentic American law.[326] Thus, the stakes at that time were considerable and would affect the ongoing character of the law in America.

Maxwell Bloomfield describes the period of Jacksonian democracy as being "a vigorous leveling movement in American law,"[327] a movement that challenged the professional dominance of lawyers over their field.[328] This experience helps to explain the importance of the formation of the American Bar Association in 1878, which Bloomfield and other scholars have described as "the dawn of modern professionalism" in the law.[329] During the same period, lawyers faced a crisis of public opinion that was also a ground for significant concern.[330] The bar responded in a self-protective fashion, ultimately making the profession far more elitist and setting back efforts at diversity.[331]

F. Dillon, the [American Bar] Association decided that one of the defects of the legal system which could be safely and conservatively reformed by lawyers was delay and uncertainty in judicial administration."). These are, of course, among the major stated goals behind the founding of the American Law Institute. *See supra* note 260.

326. *Id.* at 1371 ("At this point the American Law Institute enters upon its historic mission of transition, to liquidate the consequences of the British reception and to prepare for a new system."); COOK, *supra* note 246, at 3 (noting that it was unusual for the United States, post-Revolution, to maintain the legal system of its former owner). In another article, I explore a similar point in a different context and reach a somewhat different conclusion from Cook's—namely, that it may be quite natural for a jurisdiction emerging from colonial rule to build its law from external sources. *See* Adams, *supra* note 2, nn.28-31 and accompanying text.

327. Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306, 306 (1968) (noting that this period was characterized by "the popular election of all state judges" and "scaling down educational requirements for admission to the bar or eliminating them altogether").

328. Bloomfield describes what he characterizes as the then-current belief that "law was a rational science" with "basic principles" that "be easily grasped by all men." *Id.* at 311.

329. *Id.* at 307 (contrasting this with the "demoralization" and "deprofessionalization" of the law during the 1840s and 1850s). Professor Friedman shares this same viewpoint, describing the period following the Civil War as a time "in which lawyers became more 'professional,' drawing more sharply the distinction between *their* sort of logic and that of industrial men." Friedman, *supra* note 115, at 370 (emphasis in original).

330. Maxwell Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 15 AM. J. LEGAL HIST. 269, 270 (1971) ("Throughout the nineteenth century, at any rate, anti-lawyer protest [was] overwhelmingly a middle-class protest that center[ed] upon demands for cheaper and speedier justice."). Bloomfield described this as a "tug-of-war between the public and the legal profession that persisted throughout the nineteenth century." *Id.* at 271. *See also* COOK, *supra* note 246, at 14 (noting the pressure on lawyers, who were perceived as being responsible for the confused state of the law as a matter of professional self-interest); GOODRICH, *supra* note 49, at 285 (making reference to the pressure on attorneys to promote law reform).

331. Bloomfield, *supra* note 330, at 277 (describing the "post-Appomattox" bar as pursuing "a policy of narrow self-interest that drastically obstructed the recruitment and assimilation of such

Classification may also have been attractive because it was empirical and thus appeared scientific in the Baconian sense. Thus, the Institute founders may reasonably have believed the Restatement project to be consistent with, rather than antithetical to, the notion of empirical study.[332] So perhaps, in the face of progressive cries for reform, an organized attempt at classification, such as the Restatement project, was a safe response, meeting the need for reform without requiring the legal profession to take on more divisive topics such as social justice. In addition, although scholars in other areas of jurisprudence may wish the agenda of the Institute were different, most have little that is constructive to add to the Institute agenda or to enrich (rather than dismantle) the Restatement movement.[333]

CONCLUSION

Perhaps the preceding litany of criticism of the American Law Institute and the Restatement movement, when carefully examined, reveals itself to be merely disguised criticism of the American common-law court system. Much of the criticism that describes the Restatement movement as being over-conservative could also be directed toward the court system that provides the fodder for the Institute's projects.[334]

Both the Restatements and the common law have been described as archaic, lacking appropriate concern for social justice, imprecise in their level of generality, and sometimes even legally incorrect.[335] Along the same lines, both

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aspiring social groups as Negroes, women, and East European immigrants").

332. La Piana, *supra* note 47, at 1095 (noting that "in general Baconianism meant empiricism, the avoidance of hypotheses, a belief that careful observation of the material world and proper classification of the facts observed would allow the induction of the principles underlying the processes of nature"). La Piana adds a statement that suggests classification may also have contained natural-law threads: "This would reveal, ultimately, the very mind of God." *Id.*

333. *See e.g.*, Ellickson, *supra* note 96, at 342 ("The Critical leftists in the legal academy rarely engage in mutually advantageous exchanges with those involved in mainstream social-scientific study of legal issues.").

334. The Honorable Shirley S. Abrahamson provides this description of the American Law Institute, in a lecture she gave at the University of Wisconsin Law School: "[A]n obscure but influential forum where fights are waged with footnotes, partisanship is officially discouraged, and deliberations are conducted at semi-glacial speed." Abrahamson, *supra* note 32, at 6. If the word "obscure" were deleted, Justice Abrahamson's description might be equally appropriate for the common-law court system.

335. Perhaps the best example of each of these criticisms, insofar as they relate to the Restatement movement, comes from the following, long quote from Laura Kalman's book, *Legal Realism at Yale*. After describing Arthur Corbin's own constructive involvement in the process, she states,

> Corbin's Yale colleagues vociferously objected to the [R]estatement. Dean Charles E. Clark attacked the *Restatement of the Law of Contracts* for possessing "the rigidity of a code (with the added unreality that it is a declaration unsupported by a sovereign or

have been criticized as being poorly informed, in that their policies and decisions are sometimes based on unusual cases that become distorted when translated into more ordinary experience.[336] The judiciary has been alternately described as representative of the larger public[337] and counter-majoritarian.[338] The courts have

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> by past precedent) and without the opportunity for reform and advance which a code affords." Clark thought that the authors of the [R]estatement had been penned into a "straitjacket"; their once fruitful activities had been pressed "into the dry pulp of the pontifical and vague black letter generalities." Thurman Arnold accused [Restatement Reporter] Austin Scott of clothing modern problems "in the garb of ancient language" in the *Restatement of the Law of Trusts*. [Yale colleague Earnest G.] Lorenzen found "a vast number of specific rules conforming largely to the rigid pattern" in the [C]onflicts [R]estatement. [Conflicts of Law Restatement Reporter Joseph Henry] Beale's classification of "completely dissimilar situations under a general abstract principle" would not increase legal certainty, Lorenzen warned. "It will inevitably create exceptions and refinements and a general repetition of the wilderness of single instances and precedent which it was the purpose of the Restatement to avoid." Even Yale's most conservative theorist, William Reynolds Vance, opposed the effort. The "pontificating black letter formulas purporting to restate the law of property," he claimed, were "sometimes inaccurate, often obscure and always pompous and dull"; any judge would be "incredibly stupid" to base a decision on any of the legal rules included in the [R]estatement.

KALMAN, *supra* note 63, at 26-27. Insofar as the common-law courts are concerned, perhaps the best single source of criticism along these lines is found in Justice Benjamin Cardozo's famous article, "A Ministry of Justice," in which he calls for "modest codification" as a solution to such problems. *See generally* Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921). In another article, I explore the possibility that Justice Cardozo's article may have been intended to lay the groundwork for what became the ALI two years after the article was published. *See generally* Adams, *supra* note 258.

336. PETER H. SCHUCK, THE LIMITS OF LAW 363 (2000) ("[A]djudication constitutes a radically decentralized, poorly informed decisionmaking process, which reduces the policy coherence and general applicability of judge-made law."). In elaborating upon his point regarding the lack of sufficient information for policymaking, Schuck states, "Common-law judges are generalists, seeing relatively few cases dealing with any given subject and having little control over their issue agendas." *Id.* at 364. Elsewhere, Schuck states, "Adjudication also has a selection bias against the most typical, generalizable behavioral patterns with which policymakers should be primarily concerned." *Id.* Note that Schuck's comments relate to mass-tort litigation.

337. PAUL W. KAHN, THE CULTURAL STUDY OF LAW 78 (1999) ("[C]ourts, no less than the popularly elected political branches, claim to represent the people. When courts say what the law is, they purport to speak as the voice of the popular sovereign would speak."). Elsewhere, Kahn states, "At best, [courts] are a fair reflection of our values and beliefs, with all the tensions that we experience among these norms." *Id.* at 136. For a similar description of the Institute, see *supra* notes 38-39 and accompanying text.

338. William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* THE RULE OF LAW 265, 267 (Ian Shapiro ed., 1994) ("[J]udicial rulings, insofar as they are aimed to increase lawlikeness, must often be countermajoritarian and therefore politically unpopular.").

been called appropriately[339] and inappropriately[340] elitist. Both the judiciary and the Institute have been described as inevitably slow in their law-making process and ill-suited to effectuating major reform[341] but, elsewhere, exhorted not to be *too* slow and conservative.[342] Along the same lines, both have been criticized[343]—and, at other times, lauded[344]—for their roles as political actors.[345]

See also KAHN, *supra* note 337, at 68 ("Courts, we are told, are counter-majoritarian . . . .").

339. UNGER, *supra* note 173, at 70 ("The power to declare law must be concentrated in a relatively insulated and continuous elite."). For a similar description of the Institute, see *supra* notes 33-36 and accompanying text.

340. UNGER, *supra* note 173, at 115 ("To be tolerable within democracy a common law cannot represent the cumulative discovery and refinement of a natural and stable world of custom by a group of legal wise men."). For a description of the similar critiques of the Institute, see *supra* notes 25-38.

341. This lengthy quote from Lawrence Friedman is instructive:

> What Parliament can do in a month's intensive work, a court can do only over the years—and never systematically, since the common law does not look kindly on hypothetical or future cases. It confines itself to actual disputes. If no one brings up a matter, it is never decided. It is no answer to say that all important questions will turn into disputes; "disputes" are not litigation, and only litigation—primarily appellate litigation—makes new law. Nor is it easy for judges to lay down quantitative rules, or rules that need heavy public support (in the form of taxes) to carry out, or rules that would have to be enforced by a new corps of civil servants. Judges are supposed to decide on the basis of preexisting principles. This could hardly tell them what the speed limit ought to be, or the butterfat content of ice cream. An English (or American) court could not possibly "evolve" a Social Security law. The common law is therefore not only slow; it is impotent to effect certain kinds of significant legal change.

FRIEDMAN, *supra* note 87, at 18. For a similar critique of the Institute, see *supra* notes 69-71 and accompanying text.

342. UNGER, *supra* note 173, at 115 (asserting the need for the common law to be reinterpreted and updated continually). For a similar critique of the Institute, see *supra* notes 82-163 and accompanying text.

343. Stephen Macedo, *The Rule of Law, Justice, and the Politics of Moderation*, *in* THE RULE OF LAW 148, 170-71 (Ian Shapiro ed., 1994) ("The problem is . . . that transferring too many political issues to the courts may force relatively undigested changes on the polity."). Macedo continues: "The process could feed on itself: settling political issues through the courts today may invite others to do the same tomorrow. If the courts and the Constitution become . . . mere partisan arenas—vehicles for advancing one's partisan agenda—then these vital guardians of constitutional limits may be undermined." *Id.* at 171.

344. KAHN, *supra* note 337, at 101-02. Kahn states,

> Ordinarily, we distinguish law's rule from political action. But not always. . . . Chief Justice Earl Warren, for example, is often praised for bringing the instincts and practices of the political actor to the Supreme Court. This is not just a matter of rhetorical technique, but of seeing the possibilities for innovation and new meanings from within the Court itself. . . .[C]ourts do on occasion claim for themselves the virtues of political action.

Others simply describe the political pressures on both institutions as being inevitable.[346] Both the judiciary and the Institute have been praised for their innovation in setting policy[347] and in helping the legislature in its own law-making.[348] At the same time, they have also been cautioned against creating the

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Id.

345. Yet another view is that the courts lack political authority in any significant way or are insulated from politics. *Id.* at 130 ("Courts are rarely in a position to deny the political order the opportunity to do what it would otherwise do."). Kahn continues, "To begin with, it would be a mistake to think that they want to. Judges do not stand apart from the polity; they are a part of it, with the same values and beliefs that we find there." *Id.* Schuck makes a similar point. SCHUCK, *supra* note 336, at 363 ("[I]f political accountability for policymaking is desirable, adjudication may represent a poor vehicle for accomplishing it."). Schuck concludes, "The judiciary, which dominates the [adjudication] process, is relatively insulated from the kind of refined public opinion to which legislators and agency policymakers are subject." *Id.* For a similar critique of the Institute, see *supra* notes 43-73 and accompanying text.

346. Eskridge & Ferejohn, *supra* note 338, at 267 ("[T]he courts . . . remain chronically vulnerable to political forces within the constitutional structure . . . ."). Elsewhere, the authors state, "[C]ourts cannot avoid taking fundamental political positions, however implicitly, in deciding how to read the work of the legislature." *Id.* at 290. To elaborate, the authors state, "As these issues are profoundly political, it seems especially unlikely that their resolution can turn on a set of factual claims about that it is what legislatures are 'really' doing when producing a statute." *Id.*

347. SCHUCK, *supra* note 336, at 364 (enumerating a number of judge-made innovations in the mass-tort context that "[c]entralized, statutory systems probably would not—and in civil law countries have not [been] adopted . . . as quickly, or in some cases at all"). Schuck goes on to say, "The common-law system . . .facilitated not only their creation but also the refinements and new applications that followed." *Id.* I explore this potential mission for the Institute in another article. *See* Adams, *supra* note 258, at Part III.C ("Proposals Motivated by the Problem of Bad or Obsolete Law").

348. Jack Knight & James Johnson, *Public Choice and the Rule of Law: Rational Choice Theories of Statutory Interpretation*, *in* THE RULE OF LAW 251-52 (Ian Shapiro ed. 1994) ("[T]he courts, insofar as they act as honest and good agents, are viewed as strengthening rather than obstructing democratic processes."). The authors continue, "This is because 'enhancing the efficacy of statutes is a fundamental value in a democracy . . . .'" *Id.* at 252. Roberto Unger makes a similar point in describing the role of common-law courts in the statute-making process:

> We strengthen [the common law's] continuing vitality and authority by bringing to its case-by-case development the assumptions and analogies active in the political making, and the judicial construction, of statutory law. In this way we make it ours rather than expecting it, through its immanent development, "to work itself pure."

UNGER, *supra* note 173, at 115. A third, similar source is Hart & Sacks. This quote demonstrates the courts' crucial role vis-à-vis the legislature, as the authors see the situation:

> Courts are regularly open for the settlement of disputes, as legislatures are not. . . . Disputants with a sense of wrong are likely to seek first of all not a change in the law but a declaration that existing law is in accordance with their position. Legislatures, with far more comprehensive responsibilities than any other official institution, are unlikely to stop to listen to demands for a change in the law unless it is plain that such

appearance of invading the legislative function[349] and advised that their more appropriate role is to fashion the common law rather than fine-tuning statutes.[350]

As another example, precedent has been described as both the great strength and the great weakness of the common-law court system. When the Restatements are criticized for their over-reliance on a logical system of precedent, perhaps this criticism simply reflects frustration with the common-law courts themselves.[351] Along the same lines, criticism of the American Law Institute as having done too much (raising the specter of judicial activism) or too little (showing that the system is out of touch with social-justice needs and emerging trends)[352] mirrors the critique of both common and judge-made law.[353] It makes sense that the challenges facing the American Law Institute mirror those of the court system because many members of the Institute are judges, professors,

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> a change is needed. This is unlikely to be plain unless a court has spoken. So it has happened and continues to happen that emerging problems of social maladjustment tend always to be submitted first to the courts. . . . Legislatures and administrative agencies tend always to make law by way not of original solution to social problems, but by alteration of the solutions first laid down by the courts.

HART & SACKS, *supra* note 50, at 163-164.

349. KAHN, *supra* note 337, at 12 ("The courts always operate under a threat that they will be accused of creating—or nullifying—law without popular consent."). Kahn describes this kind of accusation as a typical move for a dissenting judge. *Id.* at 68 ("Even at the moment of decision, the dissenting voice accuses the Court of straying from law's rule."). Macedo makes a similar point: "Victories won in court . . . may bypass the arduous process of democratic deliberation and persuasion, thereby provoking resistance, resentment, and instability." Macedo, *supra* note 343, at 170. For a discussion of similar concerns with respect to the Restatement movement, see *supra* note 63 and accompanying text.

350. Roscoe Pound, *The Formative Era of American Law*, *in* THE LIFE OF THE LAW 52, 60 (John Honnold ed., 1964) (describing the strengths and weaknesses of a judiciary trained in the common-law tradition). Pound states,

> [T]he common law has never been at its best in administering justice from written texts. It has an excellent technique of finding the grounds of decision of particular cases in reported experience of the decision of other cases in the past. It has always, in comparison with the civil law, been awkward and none too effective in deciding on the basis of legislative texts.

Id.

351. Stone, *supra* note 112, at 320-21 (asserting that the various reporters alone cannot support the coherent development of the common-law system and describing precedent as both the great strength and great weakness of the common law).

352. Friedman, *supra* note 115, at 351 (describing the Restatement movement as an attempt to avoid codification through more conservative, safe reform).

353. Justice Abrahamson notes, "Currently the tension between the 'is' and the 'ought' is manifest in the formulation of the ALI's third series of [R]estatements . . . ." Abrahamson, *supra* note 32, at 22. In describing the *Restatement (Third) of Torts: Products Liability*, Justice Abrahamson continues, "Some want a document that will formulate a consensus but not create new law; others visualize the third [R]estatement as recommending change." *Id.* at 22-23.

and practitioners who were trained in a system dominated by appellate case law.

There is some evidence that leaders in the Restatement movement share this impression of the common goals and challenges that both the Institute and the courts face. President Herbert Wechsler has made the comparison overtly, directing members to "weigh all of the considerations relevant to development of the common law that our polity calls on the highest courts to weigh in their deliberations."[354] At least one leader in the Restatement movement, in indicating that criticism of the Restatement project is welcomed, has employed language seeming to suggest his expectation that the Restatements are likely to suffer from the same imperfections as the decisions of common-law courts.[355]

In closing, it is important to keep criticism of the Institute and the Restatements separate and distinct from criticism of the common law that motivates the Institute's major work and the courts that participate in its making. It is thus appropriate to be mindful of the Institute's privileged status as a private policy forum,[356] but arguably unfair to criticize it for mirroring the characteristics of the common law and the courts. Thus, in critiquing the work of the Institute, to paraphrase the words of Stendhal, it is important to separate the image from the mirror.[357]

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354. Abrahamson, *supra* note 32, at 21. Wechsler goes on to state that this approach, in which the Council formally concurred, "would enable the [R]estatements 'to attempt to be what they (had) been and (were) in fact—a modest but essential aid in the improved analysis, clarification, unification, growth and adaptation of the common law.'" *Id.*

355. Corbin, *supra* note 37, at 29 ("The productions of the Institute should receive constant criticism, both destructive and constructive, from within the membership of the Institute and from without."). Corbin goes on to state,

> There will be found bad analysis, classification, and terminology. There will be turgidity and complexity of style. In places there will be unfilled gaps where the law should have been stated; and in other places there will be labored efforts to cover unimportant details and to express every possible limitation and exception. There will be failure to recognize the obsolescence of old rules through disuse by the courts and to realize the existence of new rules already immanent in the more recent decisions and in the life around us. The men available may not be sufficiently expert or sufficiently numerous; and some that are expert and available may not be enlisted. There are problems here to be solved and weaknesses to overcome . . . . As applied by officials with narrow experience and dull minds, it may at times result in decisions as harmful as would have been rendered without it. We may be sure that the Restatement of American law will have imperfections and that new ones will develop in the future; and we should see to it that the American Law Institute is given immortal life in order to have the machinery constantly at hand for their correction.

Id. at 29-30 (footnote omitted).

356. Exploring the way in which the Restatements may change the natural development of the common law was the major focus of an earlier article. *See generally* Adams, *supra* note 2.

357. STENDHAL, *supra* note *.

FLIPPING A COIN: A SOLUTION FOR THE INHERENT UNRELIABILITY OF EYEWITNESS IDENTIFICATION TESTIMONY

NOAH CLEMENTS*

INTRODUCTION

By most accounts, mistaken eyewitness identification is the leading cause of wrongful convictions in the United States.[1] This phenomenon is not new but seems to be a timeless aspect of criminal procedure. "Centuries of experience . . . have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable . . . ."[2] Justice Frankfurter once said:

> What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.[3]

The Supreme Court has placed the blame squarely on government suggestive nature when examining witnesses[4] but has allowed even tainted identifications when the court is satisfied the identification is otherwise reliable.[5] All proposals to improve the reliability of eyewitness identifications have focused on removing

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1. *See, e.g.*, EDWIN M. BORCHARD, CONVICTING THE INNOCENT, at xiii-xv (1932) (claiming forty-four out of a case study of sixty-five innocent defendants were convicted primarily on the basis of mistaken identification); Innocence Project, *Causes & Remedies of Wrongful Convictions*, http://www.innocenceproject.org/ causes/index.php (last visited Jan. 8, 2007) [hereinafter *Causes*] (stating mistaken eyewitness identification played a major part in more than two-thirds of the project's first 130 post-conviction DNA exonerations).

2. Jackson v. Fogg, 589 F.2d 108, 112 (2d Cir. 1978) (granting habeas corpus relief to prisoner convicted solely on the basis of testimony of four eyewitnesses, after finding that the eyewitnesses' identifications were unreliable).

3. FELIX FRANKFURTER, THE CASE OF SACCO & VANZETTI 30 (1927), *quoted in* United States v. Wade, 388 U.S. 218, 228 (1967).

4. *See, e.g.*, *Wade*, 388 U.S. at 228-29 (calling governmental suggestion a "major factor contributing to the high incidence of miscarriage of justice from mistaken identification"); Stovall v. Denno, 388 U.S. 293, 301-02 (1967) (holding that identification testimony should not be admitted if it "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law").

5. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

the influential nature of governmental suggestion. For example, by using double blind sequential lineup procedures where lineup participants are shown one at a time and the officer conducting the lineup does not know which participant is the suspect.[6] However, governmental suggestion is not the only problem. Regardless if suggestion has played a part in the identification, eyewitness identification is inherently unreliable.[7] The only solution for this unreliability is to exclude the use of eyewitness identification testimony at trial unless the witness is acquainted with or otherwise familiar with the suspect.

This Article examines the unreliability of eyewitness identification testimony and proposes its exclusion. It argues that what at first may seem a radical idea, in fact, would make convictions much more reliable with a minimal negative impact on the criminal justice system. Part I discusses and provides actual examples of misidentification. Part II discusses the absence of any features by which courts and juries could use to judge the reliability of the identification in any particular case. Part III concludes by showing that excluding identification testimony would not overly burden the criminal justice system.

I. THE SUBSTANTIAL RISK OF MISIDENTIFICATION

A. Witnesses Are Likely to Mistakenly Identify the Wrong Person

The bulk of the research on eyewitness identification has been carried out since 1980,[8] well after a series of significant Supreme Court identification due process cases.[9] Thus, the Court has not had an opportunity to review new evidence on eyewitness identification reliability or to decide whether admitting inherently unreliable testimony that is as prejudicial as eyewitness testimony comports with due process.[10]

The data does not paint a pretty picture. In one early study, seventy-three unwitting convenience store clerks were subjected to memorably bizarre behavior by "customers" in 146 tests.[11] Two hours later, in only 34.2% of the tests, were the clerks able to correctly identify the customer from a non-suggestive

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6. *Causes*, *supra* note 1.

7. *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY & THE LAW 10-14 (1995) (summarizing the results of several respected identification studies).

8. *Id.* at 68.

9. *E.g.*, Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Stovall v. Denno, 388 U.S. 293 (1967).

10. There was one study, however, conducted in 1971 that merely measured subjects' ability to accurately identify a target face only eight minutes after seeing the target's picture. After ten seconds of exposure to the picture, there was 47% accuracy, and after thirty-two seconds of exposure, 75% accuracy. C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT 89 (1996) (citing Kenneth R. Laughery et al., *Recognition of Human Faces*, 55 J. APPLIED PSYCHOL. 477 (1971)).

11. CUTLER & PENROD, *supra* note 7, at 11 (citing John C. Brigham et al., *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOL. 673 (1982)).

photoarray; twenty-four hours later, the clerks could do so only 7.8% of the time.[12]

In a similar study, where the identification time period of two or twenty-four hours was chosen at random and when the customer was in the photoarray, 41% of the clerks correctly identified him.[13] However, when the customer was not in the photoarray, 34% of the clerks mistakenly identified someone else.[14] The false identification rate when the customer was in the photoarray was not recorded.

Later studies that used different time periods and situations arrived at similar results.[15] In one remarkable study, 30% of "witnesses" who had not actually witnessed an event, but who had engaged in discussions about it, later testified that they had recalled the incident and identified a person from a lineup as the culprit.[16] In summarizing these studies, Cutler and Penrod reported that the average rate of correct identifications in these simple experiments was 41.8%, while the rate of false identifications was 35.8%.[17]

Witnesses who have received training for eyewitness situations do not appear to fare any better.[18] In one recent study of 509 Navy and Marine officers in survival training, subjects were interrogated for forty minutes in high-stress and low-stress simulations and asked to identify their interrogators twenty-four hours later, using various identification procedures.[19] Remarkably, these trained

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12. *Id.*

13. *Id.* (citing Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOL. 58 (1985)).

14. *Id.*

15. *Id.* at 11-12 (citing Melissa A. Pigott et al., *A Field Study of the Relationship Between Quality of Eyewitnesses' Descriptions and Identification Accuracy*, 17 J. POLICE SCI. & ADMIN. 84 (1990) (finding four to five hours later, 47.8% correct identifications and 37.5% false identifications when culprit was not in photoarray) *and* Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972 (1988) (finding 44.2% correct identifications two hours later)).

16. MICHAEL SENG & WILLIAM CARROLL, EYEWITNESS TESTIMONY: STRATEGIES & TACTICS § 2.43 (2d ed. 2003) (citing Henry B. Brown, *An Experience in Identification Testimony*, 25 J. CRIM. LAW & CRIMINOLOGY 621 (1934)).

17. *Id.* at 12.

18. In the Pigott study, *supra* note 15, 77% of the bank tellers had received training. CUTLER & PENROD, *supra* note 7, at 12. One study involving police trainees found a 51% false identification rate when presented with a "blank" photoarray. ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL & CRIMINAL § 4-8, at 85 (3d ed. 1997 & Supp. 2004) (citing John C. Yuille, *Research and Teaching with Police: A Canadian Example*, 33 INT'L REV. APPLIED PSYCHOL. 5 (1984)). Police training was one of the factors given very heavy weight in *Manson v. Brathwaite*, 432 U.S. 98, 115 (1977), pertaining to the witness' degree of attention.

19. Abram Katz, *U.S. Navy Study: Eyewitnesses Unreliable*, NEW HAVEN REG., June 21, 2004, *available at* http://www.truthinjustice.org/navy-study.htm; *see also* Charles A. Morgan III et al., *Accuracy of Eyewitness Memory For Persons Encountered During Exposure To Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265, 267 (2004). The subjects had spent an average of 4.2 years in the service prior to the training. *Id.*

officers should have had plenty of opportunity to view their interrogators, often in very close proximity.[20]

Yet, in a live lineup, subjects could correctly identify only 30% of the high-stress interrogators and 62% of the low-stress interrogators.[21] Using a standard police-type photo spread but without elements of suggestion, only 32% of the high-stress subjects correctly identified their interrogators while 68% made incorrect identifications.[22] Using sequential photos, a technique often proposed to increase reliability by decreasing the influence of "relative similarity,"[23] the high-stress group still had only 49% accuracy while the low-stress group's accuracy dropped to 76%.[24] Furthermore, as in previous studies,[25] there was absolutely no correlation between confidence or certainty of the eyewitness and accuracy of the identification in either the low-stress or the high-stress group.[26]

B. The Risk of Misidentification Is Not a Theoretical One

There is no way to know for certain how many convictions are based on mistaken identification testimony. Estimates range as high as 5%.[27] One conservative study believes that as few (or as many) as 0.5% of convicted felons are actually innocent.[28] Accepting the conservative figure would mean that as

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20. While many details of the study are classified, there is every indication that subjects were "man-handled" during the high stress interrogations. Katz, *supra* note 19.

21. *Id.*

22. *Id.* The subjects that experienced thirty minutes of low-stress interrogation, however, were able to accurately identify their interrogators 88% of the time from a photo spread. *Id.*

23. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 617 (1998).

24. Katz, *supra* note 19. The report indicated that an identification was made in every case, showing that the high-stress group made more mistaken identifications than correct ones in every case, and even the low-stress group of trained military officers made an unacceptable number of mistaken identifications, ranging from 12% for the photo spread to 38% for a live lineup. *Id.*

The low stress group's relatively low false identification rate should not be considered typical of eyewitnesses in general because these witnesses had an extraordinary opportunity to view the target: forty minutes in close proximity without physical stress. Rather, one should note that even under these circumstances, which should lead to very reliable identifications, only twenty-four hours after the event, the subjects made 38% false identifications in a live lineup and 25% false identifications in a sequential photo test. Morgan et al., *supra* note 19, at 272.

25. *See, e.g.*, LOFTUS & DOYLE, *supra* note 18, § 3-12; SENG & CARROLL, *supra* note 16, § 2.4.

26. Katz, *supra* note 19.

27. LOFTUS & DOYLE, *supra* note 18, § 4-1, at 77.

28. HUFF ET AL., *supra* note 10, at 59-62. The authors tried to be reasonably conservative. The authors took the research from an early study by Kalven and Zeisel, H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966), which found that in 4% of criminal cases studied, the jury convicted where the judge would have found the defendant not guilty.

Because the jury could be expected to be more accurate than the judge at least some of the

many as 10,000 people a year are convicted of crimes they did not commit.[29] It is impossible to know how many of these convictions are based on mistaken identification testimony, but one can extrapolate based on how many exonerations involved mistaken eyewitness identification testimony.

Studies of the causes of wrongful convictions show that mistaken eyewitness identification testimony accounts for between one-half to two-thirds of these errors.[30] These studies encompass a wide range of crimes.[31] Notably, these mistakes were not confined to the cases where there was only one eyewitness and included instances where the witnesses had ample time to view the perpetrator.

In one celebrated case of mistaken identification which occurred in 1979, seven store clerks were robbed at gunpoint by a "gentleman bandit" who pointed a chrome-plated handgun at them.[32] These seven clerks identified Father Bernard Pagano, a Roman Catholic priest, as the robber, and few doubted that he would have been convicted if another man had not confessed before the trial ended.[33]

Another infamous example of misidentification involved the 1984 rape of Jennifer Thompson, a twenty-two-year-old college student with a 4.0 grade point average.[34] According to Thompson, during her ordeal she "studied every single

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time, perhaps as much as half the time, the authors halved this estimate and then assumed another half of these cases appealed successfully. *Id.* at 60. The authors combined this figure with their own survey that questioned Ohio prosecutors, judges and public defenders about their *perception* of wrongful conviction rates. *Id.* at 61. Because the majority of respondents believed that the rate was something less than 1%, the authors again halved the 1% rough estimate based on the Kalven & Zeisel study, and arrived at a 0.5% rate, which they believed was conservative. This figure does not account for cases where both the judge and the jury incorrectly believed in the defendant's guilt.

29. *Id.* at 62. Peter Neufield and Barry Scheck believe that this number is probably much higher, based on the 25% DNA exoneration rate in sexual assault cases. EDWARD CONNORS ET AL., NAT'L INST. OF JUSTICE & DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, at xxviii-xxxi (1996).

Because there does not seem to be anything inherent in sexual assault cases that would make eyewitnesses more prone to mistakes than in robberies or other serious crimes where the crucial proof is eyewitness identification, it naturally follows that the rate of mistaken identifications and convictions is similar to DNA exoneration cases.

30. *See, e.g.*, BORCHARD, *supra* note 1, at xiii-xv (citing forty-four out of sixty-five innocent defendants equaling 67.7%); HUFF ET AL., *supra* note 10, at 64 (finding of 205 wrongful convictions, including 54 from Borchard, that 52.3% were due to eyewitness misidentification); *Causes*, *supra* note 1 (stating more than two-thirds of first 130 innocent defendants exonerated by DNA).

31. Of the 205 cases studied in the Huff study, 45% involved murder or manslaughter, 30.5% involved robbery, and 12.5% involved rape. HUFF ET AL., *supra* note 10, at 64.

32. SENG & CARROLL, *supra* note 16, § 1.2.

33. *Id.*

34. Jennifer Thompson, *I Was Certain, But I Was Wrong*, N.Y. TIMES, June 18, 2000, *available at* http://tinyurl.com/4qbea. Cutler & Penrod's meta-analysis of studies involving more than 16,000 subjects shows that there is no correlation between intelligence and accuracy. CUTLER

detail on the rapist's face."[35] After the rape, she immediately went to the police department and worked on a composite sketch.[36] She then identified Ronald Cotton in a photo array a few days after the rape and still later in a lineup.[37] Cotton was convicted in January 1985.[38]

Ronald Cotton was not the man who raped Thompson.[39] After an appeals court overturned the conviction because of improper exclusion of exonerating evidence, Cotton was granted a new trial in 1987, this time for two rapes because a "second victim decided that Cotton was her assailant."[40] Although there was evidence that the actual rapist, Bobby Poole, confessed in prison, the judge refused to admit that evidence at trial.[41] When Bobby Poole was brought into court during a pre-trail hearing, Thompson was asked if she had ever seen him.[42] She said, "I have never seen him in my life."[43] But she was mistaken. In 1995, DNA tests proved that Bobby Poole was the rapist.[44] By that time Ronald Cotton had spent more than ten years in prison.[45]

Not only have people been falsely imprisoned, some have surely been executed based on false eyewitness identification.[46] One hundred and twenty-three death row prisoners have been exonerated since 1973.[47] Mistaken

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& PENROD, *supra* note 7, at 81-82.

35. Thompson, *supra* note 34. Research shows that Thompson's efforts to study and remember the details of her attacker's face should have led to more accurate memory retention and identification later. SENG & CARROLL, *supra* note 16, § 2.33. The Supreme Court in *Neil v. Biggers* placed a great deal of emphasis on a similar degree of attention in assessing the reliability of the victim's identification under due process. 409 U.S. 188, 200 (1972).

36. Thompson, *supra* note 34.

37. *Id.*

38. Innocence Project, *Case Profiles: Ronald Cotton*, http://www.innocenceproject.org/case/display_profile.php?id=06 (last visited Jan. 8, 2007) [hereinafter *Ronald Cotton*].

39. *Id.*

40. *Id.*

41. *Id.*

42. Thompson, *supra* note 34.

43. *Id.*

44. *Id.*

45. *Ronald Cotton*, *supra* note 38.

46. *See generally* Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, 61 LAW & CONTEMP. PROBS. 105 (1998).

47. Death Penalty Information Center, *Innocence: List of Those Freed from Death Row*, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (last visited Jan. 8, 2007). DPIC describes the criteria for inclusion on the exoneration list in the following manner:

> For Inclusion on DPIC's Innocence List: Defendants must have been convicted, sentenced to death and subsequently either—a) their conviction was overturned AND (i) they were acquitted at a re-trial or (ii) all charges were dropped; b) they were given an absolute pardon by the governor based on new evidence of innocence.

Id. Some claim that the list is misleading because exonerees have not been proven innocent. *See, e.g.*, FLORIDA COMMISSION ON CAPITAL CASES, CASE HISTORIES: A REVIEW OF 24 INDIVIDUALS

eyewitness identification testimony played a major role in forty-nine of these cases.[48] These numbers should given a base of 1060 executions since 1976,[49] imply a more than 10% innocence rate and an extremely high 5% mistaken identification rate. While it is almost impossible to definitively prove innocence after a prisoner has been executed because of the lack of judicial review, the purported victim was later found alive in thirty-two cases between 1900 and 1985.[50] But states do not willingly participate in this inquiry—"some states candidly admit that their policy is never to confess error."[51]

The role of mistaken identification in the death penalty innocence cases is much smaller than the two-thirds rate seen in the innocence project cases,[52] however. This may be because eyewitness testimony plays a smaller part in death penalty cases than in other serious crimes. According to a Houston Chronicle study, which included a survey of Texas defense lawyers and prosecutors as well as an examination of several capital murder cases tried in Houston, "the vast majority of death penalty trials has [sic] no eyewitness

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RELEASED FROM DEATH ROW 5 (Sep. 10, 2002), *available at* http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf ("A defendant is found guilty or not guilty, never innocent."). These claims ignore the substantial burdens required by appellate courts to set aside convictions, especially when the issue raised is one of innocence, and misplaces the subsequent burden of proof.

48. Author's hand-count based on DPIC list of exonerated prisoners. Death Penalty Information Center, *Cases of Innocence 1973-Present*, http://www.deathpenaltyinfo.org/article.php?scid=6&did=109 (last visited Jan. 8, 2007).

The Center on Wrongful Convictions (CWC) performed an earlier, more thorough study of the first eighty-six legally exonerated death row prisoners since 1973, and found that forty-six, or 53.5%, involved faulty eyewitness testimony. Rob Warden, Center on Wrongful Convictions, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row*, May 2, 2001, http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/eyewitnessstudy01.htm. The CWC list included some freed prisoners as exonerated who did not appear on the DPIC list: for example, William Jent and Earnest Miller.

49. Death Penalty Information Center, *Executions by Year*, http://www.deathpenaltyinfo.org/article.php?scid=8&did=146 (last visited Jan. 30, 2007).

50. David Margolick, *25 Wrongfully Executed in U.S., Study Finds*, N.Y. TIMES, Nov. 14, 1985, at A19.

51. Edward Lazarus, *Why States Don't Confess Error in Death Penalty Cases*, CNN.COM, June 14, 2000, http://archives.cnn.com/2000/LAW/06/columns/lazarus.saldano.6.12/index.html.

52.

> The Innocence Project is a non-profit legal clinic affiliated with the Benjamin N. Cardozo School of Law at Yeshiva University and created by Barry C. Scheck and Peter J. Neufeld in 1992. The project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice. As a clinic, law students handle case work while supervised by a team of attorneys and clinic staff.

Innocence Project, *About the Innocence Project*, http://www.innoncenceproject.org/about (last visited Feb. 8, 2007).

testimony."[53]

One recent execution where the conviction rested mainly on questionable eyewitness identification testimony was the case of Gary Graham.[54] The only witness who claimed to see Graham commit the murder in a supermarket parking lot "claimed to have seen a total stranger . . . 9:30 at night, in the dark, from a distance of 40 feet away for two seconds."[55] There were many problems with this identification. When presented with a photoarray containing Gary Graham's picture two weeks after the murder, Bernadine Skillern said that Graham's photo resembled the murderer but that the murderer's complexion was darker and his face thinner.[56] The next day, she picked Graham out of a lineup—he was the only subject in both the photoarray and the lineup.[57] Six other eyewitnesses failed to identify Graham as the murderer, who they said was much shorter than Graham.[58] Two witnesses who saw the killer in the supermarket checkout lane, including one who stood next to him, emphatically declared that Gary Graham was the wrong man.[59] Graham was executed on June 22, 2000.[60]

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53. Steve Brewer, *Murder Trial Eyewitnesses 'A Luxury,'* HOUSTON CHRON., June 22, 2000, at A17. Contrary to the findings of researchers, *see infra* notes 126-30 and accompanying text, the experienced capital defense lawyers surveyed stated that eyewitness testimony would actually create an opportunity for them to create reasonable doubt, because eyewitness testimony is so unreliable. *Id.*

54. CNN.COM, *Execution Looms for Texas Inmate Convicted on Testimony of One Witness*, June 15, 2000, http://archives.cnn.com/2000/LAW/06/15/graham.execution/#1.

55. *Id.*

56. Interview with Larry Marshall, The New Abolitionist (Sept. 2000), *available at* http://www.nodeathpenalty.org/newab016/larryMarshall.html [hereinafter New Abolitionist]; *see also* http://www.quixote.org/ej/grip/reasonabledoubt/chart-Gary%20Graham.html (last visited Feb. 9, 2007).

57. *Id.* Nathan Sobel contends that the use of photographs before a lineup reduces identification reliability and raises fairness issues. NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL & PRACTICAL PROBLEMS § 10.2 (2d ed. rev. 2004)

58. New Abolitionist, *supra* note 56. Graham's problems may have been compounded by poor representation by Ron Mock, who did not call two witnesses listed in the police report. Ron Mock was infamous in Texas for losing more death penalty cases than any other lawyer. *See* Rick Casey, *Mock Gone, Not Mockery*, HOUSTON CHRON., Dec. 3, 2004, at B1.

59. New Abolitionist, *supra* note 56; *see also* Statement of Richard Burr, *Texas Execution: a NewsHour with Jim Lehrer Transcript*, June 22, 2000, *available at* http://www.pbs.org/newshour/bb/law/jan-june00/execution_6-22a.html.

60. Lou Jones, *Gary Graham*, FINAL EXPOSURE: PORTRAITS FROM DEATH ROW (1996), http://www.fotojones.com/editorial/deathrow/inmates/graham.html.

II. CURRENT RESPONSES AND PROPOSALS DO NOT MEANINGFULLY LESSEN THE RISK OF MISIDENTIFICATION

A. The Neil v. Biggers *Reliability Factors Do Not Sufficiently Ensure That Only Reliable Eyewitness Identifications Are Admitted*

In determining whether an identification should be excluded as violating Due Process, the Supreme Court has established a threshold question of whether the pre-trial identification procedures contained elements of suggestion.[61] The Court has singled out impermissible suggestion because it believes that suggestive procedures "increase the likelihood of misidentification."[62] The reliability of a particular eyewitness identification is only examined once impermissible suggestion is found, but suggestion per se does not violate a defendant's Due Process rights.[63] One Assistant U.S. Attorney has stated that allowing suggestive procedures "is analogous to creating one piece of evidence, the identification that results from the procedure, and destroying another piece of evidence, the identification, or failure of identification, that would have resulted from a correctly conducted process."[64]

Suggestive identification procedures may well be unfair in and of themselves,[65] but there is some indication that if the actual culprit is included in the lineup or photoarray, suggestion does not affect the accuracy of the identification.[66] However, if the actual culprit is not present, even subtle suggestion results in a misidentification rate of up to 90%, as compared to a misidentification rate of 45% if suggestive procedures are not used.[67] Although there is some indication that the effect of suggestive procedures is less in real crimes than in staged ones,[68] even the non-suggestive false identification rates (45%) must be seen as unacceptable.

Once suggestion is found, courts will determine whether the identification is nonetheless reliable by weighing the factors set out in *Neil v. Biggers*[69] against

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61. Neil v. Biggers, 409 U.S. 188, 198 (1972).

62. *Id.*

63. *Id.* at 198-99; *accord* Manson v. Brathwaite, 432 U.S. 98, 113-14 (1977) (characterizing the Due Process right to identification procedures free from suggestion as merely an "evidentiary interest").

64. Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 292 (1991).

65. *Id.*

66. CUTLER & PENROD, *supra* note 7, at 116-17 (citing Brian Cutler et al., *The Reliability of Eyewitness Identifications: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 223 (1987)).

67. *Id.* at 117.

68. *Id.* at 119 (citing G. Kohnken & A. Maass, *Eyewitness Testimony: False Alarms on Biased Instructions?*, 73 J. APPLIED PSYCHOL. 363 (1988)).

69. 409 U.S. 188, 199-200 (1972).

the "corrupting effect of the suggestive identification itself."[70]

> These [factors] include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.[71]

The problem is that this reliability test "is not a satisfactory method of measuring reliability."[72]

1. The Opportunity of the Witness to View the Criminal.—The amount of time that a witness views a criminal, the lighting conditions, and the proximity of the witness are all relevant to the reliability of an identification. Lighting conditions and the witness's distance from an event have a particularly great influence on a witness's ability to perceive objects and people.[73] However, even in perfect perception conditions where accuracy is highest, identifications are unreliable and mistakes are rampant.[74] The effect of the exposure time is a bit more complex.

Curiously, the amount of time a witness views an event does not correlate with accuracy. Although "[c]ommon sense tells us that the amount of time available for viewing a perpetrator is positively associated with the witness's ability to subsequently identify him,"[75] this turns out not to be the case. Instead, Cutler and Penrod's meta-analysis of research involving more than 16,000 subjects shows slightly decreasing marginal improvement in recognition as exposure time grows, and this improvement is relatively small.[76] This seems to contradict a 1971 study which showed that eight minutes after an event, eyewitness recognition rate ranged from 47% accuracy after ten seconds of exposure to 75% accuracy after thirty-two seconds of exposure.[77] This study can be explained by the fact that most identifications occur more than eight minutes after an event. The difference in accuracy will decrease as more time elapses before the eyewitness is asked to identify the perpetrator.[78]

The aforementioned Navy study may be particularly instructive in this

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70. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

71. *Id.*

72. Rosenberg, *supra* note 64, at 276.

73. LOFTUS & DOYLE, *supra* note 18, § 2-4, at 15.

74. *See supra* Part I.

75. CUTLER & PENROD, *supra* note 7, at 101.

76. *Id.* The meta-analysis was an effort to normalize all of the disparate eyewitness studies available before 1995. They account for statistical variations by putting the studies together and arriving at a vast set of data for many different witnessing variables.

77. HUFF ET AL., *supra* note 10, at 89 (citing K.R. Laughery et al., *Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph*, 55 J. APPLIED PSYCHOL. 477 (1971)).

78. CUTLER & PENROD, *supra* note 7, at 101.

regard.[79] The officers were subjected to interrogations of forty minutes, much longer than the short seconds or minutes that most crimes encompass.[80] Yet, the reliability of the identifications made by these highly trained military officers was not significantly greater than in other studies with shorter event durations.[81]

Another problem is that courts will analyze the first factor on the basis of the witness's recollection of the circumstances, which is subject to an overestimation bias.[82] In one study, witnesses overestimated the duration of a thirty-four-second event by a factor of two-and-one-half times.[83] The confidence bolstering effect of suggestion may have even greater effects that insulate this factor from meaningful review.[84] Recent research indicates that as the confidence of mistaken eyewitnesses is inflated, they report that the lighting was better, they were closer to the action, and the event took longer.[85]

2. The Witness' Degree of Attention.—Research shows that efforts to study and remember the details of an event or facial features should lead to more accurate memory retention and identification later.[86] Courts have placed emphasis on witnesses' training in order to show that they would pay close attention to the person and event.[87] Courts also tend to believe that a person in danger will pay greater attention to detail than otherwise.[88]

However, studies have shown that police officers specially trained in facial recognition are no better than the overall population at either making correct identifications or refraining from making false ones.[89] Furthermore, many studies have shown that violence or other stressful situations greatly decrease the ability of a witness to make accurate identifications.[90] The Navy study is probably the most accurate one to date on the effects of stress on subsequent identifications. Most other researchers are reluctant to subject their witnesses to the kinds of stress experienced during violent crimes. The effect of stress in that study was

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79. Katz, *supra* note 19.

80. Morgan et al., *supra* note 19, at 268.

81. *Compare id.* at 272, *with* CUTLER & PENROD, *supra* note 7, at 11-12.

82. Rosenberg, *supra* note 64, at 278-79.

83. LOFTUS & DOYLE, *supra* note 18, § 2-5, at 16 (citing R. Buckhout, *Eyewitness Identification and Psychology in the Courtroom*, 4 CRIM. DEF. 5 (1978)).

84. *Id.* § 1-3, at 1.

85. *Id.* (citing Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1988)).

86. CUTLER & PENROD, *supra* note 7, at 88; SENG & CARROLL, *supra* note 16, § 2.33.

87. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 115 (1977) ("[A]s a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail . . . .").

88. *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 200 (1972) ("She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes.").

89. CUTLER & PENROD, *supra* note 7, at 86 (citing M. M. Woodhead et al., *On Training People to Recognize Faces*, 22 ERGONOMICS 333 (1979)).

90. *See* LOFTUS & DOYLE, *supra* note 18, § 2-7.

enormous.[91]

3. The Accuracy of a Prior Description.—There is no agreement whether identifications preceded by a detailed description objectively matching the person later identified are more accurate than other identifications.[92] This inconsistency extends to the question of a relationship between the ability to describe faces and accuracy in identifying faces.[93] Furthermore, even where Cutler and Penrod found that subjects who had a high ability to describe faces could make more accurate identifications, there was a very low correlation between consistent descriptions and accuracy.[94] Unfortunately, both courts and jurors value description consistency.[95] To a non-psychologist evaluating the conflicting results, the evidence should be considered inconclusive at best.[96]

4. The Certainty of Eyewitness Identification.—If there is one thing that the research is virtually unanimous on, it is this: there is no correlation whatsoever between eyewitness certainty and accuracy.[97] "Experienced judges understand that the most positive witness is not always the most reliable."[98] Even if confidence did correlate with accuracy,[99] the fact that confidence is malleable and often bolstered by police and prosecutors should raise doubt in the predictive power of the confidence.[100] Consequently, many courts have begun to place very

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91. *See supra* notes 21-24 and accompanying text (showing false identification rates up to 68%).

92. *See* CUTLER & PENROD, *supra* note 7, at 93 (comparing Pigott et al.'s, *supra* note 15, 1990 study showing no significant correlation between description accuracy, completeness and congruence with Wells's, *supra* note 23, conflicting 1985 study).

93. *Id.* at 83 (citing Peter N. Shapiro & Steven Penrod, *Meta-analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139 (1986)); *see also* Rosenberg, *supra* note 64, at 277 (citing Wells & Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCHOL. 347 (1983)); Goldstein et al., *Does Fluency of Face Description Imply Superior Face Recognition?*, 1979 BULL. PSYCHONOMIC SOC'Y 13, 15-18.

94. CUTLER & PENROD, *supra* note 7, at 93.

95. *See, e.g.*, Gregory-Bey v. Hanks, 332 F.3d 1036, 1050 (7th Cir. 2003); State v. Cheeseboro, 552 S.E.2d 300, 308 (S.C. 2001); CUTLER & PENROD, *supra* note 7, at 183 (summarizing studies jurors' beliefs in the predictive power of consistent description of peripheral details); SOBEL, *supra* note 57, § 6.7 (summarizing many cases where description accuracy and consistency played a major role).

96. *Compare* CUTLER & PENROD, *supra* note 7, at 83 (summarizing studies where eyewitnesses with a high ability to describe faces made more correct identifications, but it was unknown whether they made fewer false identifications), *with* Rosenberg, *supra* note 64, at 277 (suggesting no such relationship between ability to describe faces and accurate identifications).

97. *See, e.g.*, CUTLER & PENROD, *supra* note 7, at 94-95; LOFTUS & DOYLE, *supra* note 18, § 3-12; SENG & CARROLL, *supra* note 16, § 2.4.

98. SOBEL, *supra* note 57, § 6.12, at 6-50.

99. Ebbe B. Ebbesen & Vladimir J. Konecni, *Eyewitness Memory Research: Probative v. Prejudicial Value*, 5 INT'L DIG. HUM. BEHAV. SCI. & LAW 2 (1996), *available at* http://www.psy.ucsd.edu/~eebbesen/prejvprob.html.

100. *See* CUTLER & PENROD, *supra* note 7, at 186-90; LOFTUS & DOYLE, *supra* note 18, § 3-

little reliance on witness confidence.[101]

5. The Time Between the Crime and the Confrontation.—The amount of time passed before a witness or victim identifies the perpetrator is undoubtedly an important factor in determining the reliability of an identification. Memory retention apparently drops off in a sharp "forgetting curve" after an event, eventually stabilizing into an extremely low rate of accurate identification, a rate approaching chance in some studies.[102]

Cutler and Penrod's survey of studies that manipulated retention intervals demonstrated that fewer correct identifications (51% vs. 61%) and more false identifications (32% vs. 24%) were associated with longer delays.[103] Very short intervals may be particularly important when it comes to reducing false identifications. In one study looking at very short intervals (two hours versus twenty-four hours) in low stress situations, false identifications increased from 15% to 52%, while correct identifications decreased less dramatically from 43% to 39%.[104]

There is some evidence, however, that this factor is much less relevant than the opportunity to view.[105] This may be because the process of forgetting does not seem to occur in a predictable passive decay mechanism, but rather in a more complex manner where new experiences, and even older ones, interfere with the process of reliable memory.[106] In some cases memories may be affected by unconscious transference, where a person seen in another context is identified as the criminal.[107] Furthermore, in some cases, violent events may make people engage in a process of "motivated forgetting," where the subconscious mind will block aspects of the event from memory.[108]

The problem is not that the courts rely too heavily on reliability factors that do not accurately predict reliability, such as the degree of attention, but that even if every factor pointed to a more reliable identification, the corresponding degree of reliability is still unacceptable. Even the inclusion of other, more valid reliability factors, such as whether the testimony involved cross-race identification, would not make eyewitness identification testimony sufficiently

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101. *E.g.*, Krist v. Eli Lilly & Co., 897 F.2d 293, 296-97 (7th Cir. 1990) (questioning probativity of witness certainty in any context); Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (reversing a conviction because the jury charge on eyewitness reliability included element of certainty); Commonwealth v. Santoli, 680 N.E.2d 1116, 1121 (Mass. 1997) (disapproving jury instructions on witness certainty); State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (adopting alternative reliability criteria without certainty factor); SOBEL, *supra* note 57, § 6.12.

102. LOFTUS & DOYLE, *supra* note 18, § 3-2(a).

103. CUTLER & PENROD, *supra* note 7, at 106.

104. *Id.* (citing Krafka & Penrod, *supra* note 13).

105. SOBEL, *supra* note 57, § 6.13.

106. SENG & CARROLL, *supra* note 16, § 2.38.

107. LOFTUS & DOYLE, *supra* note 18, § 4-10.

108. *Id.* § 3-3.

reliable.[109] The baseline accuracy rates (assuming that every factor pointed to a "more reliable" identification) range from 50-60% even in non-stressful witnessing situations which is not too much more reliable than a coin toss.

Courts acknowledge this, though, and rely on the jury to get it right. The Supreme Court has placed a great deal of confidence in the adversarial jury system as a means of ferreting out mistaken eyewitness identification testimony:

> It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness . . . . While identification testimony is significant evidence, such testimony is still only evidence . . . .
>
> Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to both any suggestibility in the identification procedure and any countervailing testimony such as [sic] alibi.[110]

B. Juries Cannot Meaningfully Determine Whether Eyewitness Identification Is Accurate

"Few moments are more dramatic than when a courtroom witness, upon prompting from the prosecutor, outstretches an arm, extends a finger, and declares with rock-solid certainty that the accused is the person she saw fleeing the scene of the crime with bloodied hands."[111] Studies have shown that jurors overwhelmingly believe eyewitness identification testimony. Rare is the My Cousin Vinny moment, where the defense lawyer can show that the eyewitness is blind or viewing the event through filthy windows.[112] In a couple of studies, even this sort of discrediting information (the eyewitness had very poor eyesight and was not wearing glasses at the time) resulted in only a 4% lower conviction rate.[113] Cutler and Penrod state directly, "[T]here are more convictions than there are accurate identifications."[114] Jurors believe in eyewitnesses "despite impeachment, despite aggressive cross-examinations, and despite cautionary instructions."[115] Jurors have an "implicit faith" in eyewitness identification

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109. *See* CUTLER & PENROD, *supra* note 7, at 104 (discussing Penrod & Shapiro's meta-analysis that showed that cross-race identifications were less accurate (57% versus 63%) and subject to more false identifications (22% versus 18%)); LOFTUS & DOYLE, *supra* note 18, § 4-9 (discussing a study that found 55% false identification rate for cross-race identification versus 35% for same-race).

110. Manson v. Brathwaite, 432 U.S. 98, 113 n.14 (1977) (quoting Clemons v. United States, 408 F.2d 1230, 1251 (D.C. Cir. 1968)).

111. LOFTUS & DOYLE, *supra* note 18, § 4-1, at 75.

112. MY COUSIN VINNY (Twentieth Century Fox 1992).

113. CUTLER & PENROD, *supra* note 7, at 191.

114. *Id.* at 186.

115. LOFTUS & DOYLE, *supra* note 18, § 9-1, at 200.

testimony and "tend to dispose of information that challenges that faith."[116] Even if jurors were disposed to question the accuracy of an identification because eyewitness identification testimony is inherently unreliable, jurors would be simply unable to distinguish correct identifications from false ones.[117]

In one study involving mock jurors, whether leading or open questions were used and whether the witness was accurate or not, between 73-86% of "jurors" believed the eyewitness identification.[118] The criteria by which jurors judge the reliability of a witness do not correlate with accuracy. Truth is not at issue—we can assume that the victims and other eyewitnesses making the identification are being truthful, even when mistaken. The eyewitness is usually "sincerely convinced of the accuracy of his or her testimony."[119] Jurors tend to evaluate eyewitnesses by three criteria: witness confidence, consistency, and memory of specific details.[120] None of these criteria correlate with identification accuracy.

For example, in one study, "jurors" predicted an 83% probability that a "completely certain" eyewitness would correctly identify a culprit, compared with a 28% probability that a "somewhat uncertain" witness would do so.[121] However, studies have found that there is very little correlation between witness confidence and accuracy.[122] There is similarly little correlation between witness consistency or memory of specific details and accuracy.[123] In fact, memory of peripheral details will increase the likelihood of a witness making an identification with confidence, but is inversely correlated with accuracy.[124]

Even experienced defense attorneys are unable to effectively counter jurors' propensity to believe eyewitness testimony. Cutler and Penrod found that an attorney's degree of experience and presumed skill at cross-examination did not significantly influence verdicts, even when correlated with known mistaken identifications.[125] "Cross-examination, a marvelous tool for helping jurors

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116. *Id.*

117. *See generally* Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 170-88 (1990).

118. CUTLER & PENROD, *supra* note 7, at 181-82 (citing Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440 (1979)).

119. LOFTUS & DOYLE, *supra* note 18, § 10-1(a).

120. CUTLER & PENROD, *supra* note 7, at 181-90, 200-03. Some commentators say that the criteria that jurors use to evaluate eyewitness identification is the same as that used for all witness testimony: perception, sincerity, and memory—the difference may in the end be semantic. *See* Friedland, *supra* note 117, at 181.

121. CUTLER & PENROD, *supra* note 7, at 178 (citing Gary Wells, *How Adequate Is Human Intuition for Judging Eyewitness Testimony?*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 256 (Gary Wells & Elizabeth Loftus eds., 1984)).

122. *Id.* at 94-95; LOFTUS & DOYLE, *supra* note 18, § 3-12; SENG & CARROLL, *supra* note 16, § 2.4, § 2.40.

123. *See supra* notes 92-96 and accompanying text.

124. CUTLER & PENROD, *supra* note 7, at 94.

125. *Id.* at 186.

discriminate between witnesses who are intentionally deceptive and those who are truthful, is largely useless for detecting witnesses who are trying to be truthful but are genuinely mistaken."[126] Normally, cross-examination serves to expose an insincere or dissembling witness.[127] However, with eyewitness identification testimony, an aggressive cross-examination only serves to highlight the witness's sincerity.[128] The attorney can question the witness about any factors, such as stress or cross-race identification, that would lead to more erroneous identifications,[129] but jurors do not tend to credit these factors in assessing the witness's credibility.[130]

Nor could expert witnesses help jurors to determine whether a particular witness has made an accurate identification or not. While expert testimony will tend to increase the amount of time that juries spend in deliberation discussing the eyewitness testimony (from 10% of the total deliberation time to 28%) and decrease the conviction rate by up to 20%,[131] expert testimony cannot help the jury determine whether any particular identification is accurate or not.[132] Expert testimony can inform jurors about the factors which would make an identification particularly unreliable, and also decrease jurors' reliance on witness confidence.[133] However, when not presented with the particular factors which would make the identification more unreliable than the baseline, jurors will place even greater weight on the identification.[134] This reliance is unwarranted considering that most studies place the baseline reliability rate of eyewitness identification around 50%.[135]

C. Current Proposals May Improve Reliability but Not Enough

There have recently been a few proposals to improve the reliability of

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126. Wells et al., *supra* note 23, at 609.

127. LOFTUS & DOYLE, *supra* note 18, § 10-1(a).

128. *Id.*

129. *Id.* § 10-2.

130. CUTLER & PENROD, *supra* note 7, at 197-209 ("[T]he effectiveness of cross-examination as a safeguard is still questionable in light of the lack of juror sensitivity to factors that are known to be diagnostic of eyewitness reliability.").

131. *Id.* at 218-21.

132. Ebbesen & Konecni, *supra* note 99, at 4 (arguing that not only is there no theory which would allow an expert to predict the accuracy of a particular identification, but also that the effect of combining the various reliability factors is unknown).

But see LOFTUS & DOYLE, *supra* note 18, § 11-11 (advocating practitioners' use of trace evidence analogy to convince judges that "expert testimony does not necessarily threaten *only* a rise in the jurors' general level of skepticism about eyewitnesses, but actually points to specific factors in this specific case that are diagnostic of reliability or error") (emphasis added).

133. CUTLER & PENROD, *supra* note 7, at 227.

134. *Id.* at 227-30.

135. *See supra* notes 11-26 and accompanying text.

eyewitness identification evidence[136] by incorporating the recommendations of Gary Wells and his collaborators for improving identification accuracy.[137] These proposals seek not only to eliminate any inadvertent suggestion[138] which may taint the reliability of an identification but also to counteract the tendency for witnesses to choose the person in the lineup or photoarray[139] who merely looks the most similar to the culprit, a tendency known as "relative judgment."[140] These proposals range from improved questioning techniques by investigating officers[141] and simply informing the witness that the perpetrator may not be in the lineup[142] to changing lineup procedures themselves by using blank[143] or sequential lineups.[144]

However, even if the proposal is seen as the most effective of these procedures, the use of double blind sequential lineups do not make eyewitness identifications reliable enough.

Many psychologists propose double blind sequential lineups to improve reliability—some studies have shown that they can reduce the false identification rate by more than 50%.[145] What makes psychologists so enthusiastic about this procedure is that it has appeared to reduce false identification rate in experiments without adversely affecting the ability to obtain correct identifications when the culprit is in the lineup.[146] However, two large-scale real-world tests have cast some doubt on the efficacy of this technique. In addition to the Navy study, where the low stress interrogation group made fewest false identifications with

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136. *See generally* NAT'L INST. OF JUST., DEP'T OF JUST., EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), *available at* www.ncjrs.gov/pdffiles1/178240.pdf [hereinafter THE GUIDE].

137. Wells et al., *supra* note 23.

138. The Guide assumes that law enforcement is acting in good faith. THE GUIDE, *supra* note 136, at 2.

139. The term "lineup" will be used to refer to both photoarrays and live lineups.

140. Wells et al., *supra* note 23, at 613-15 ("[M]ost of the 54% who identified the culprit in a culprit-present lineup would simply have identified someone else if the culprit had not been present . . . eyewitnesses tend to select whomever looks most like the perpetrator regardless of whether the actual perpetrator is in the lineup.").

141. THE GUIDE, *supra* note 136, at 13-16, 21-25.

142. *Id.* at 32. One study found that simply telling a witness that the culprit may not be in the lineup reduced the false identification rate *when the culprit was not in the lineup* from 78% to 33%, while having no adverse effect on a witness's willingness to make a positive identification when the culprit *was* in the lineup. Wells et al., *supra* note 23, at 615.

143. Wells et al., *supra* note 23, at 616.

144. THE GUIDE, *supra* note 136, at 34, 36.

145. CUTLER & PENROD, *supra* note 7, at 128. One commentator stresses the importance of making sure that sequential lineups are double blind, if done at all, since the effect of inadvertent suggestive clues may be greater than in simultaneous lineups. Wells et al., *supra* note 23, at 634.

146. CUTLER & PENROD, *supra* note 7, at 128. Cutler & Penrod have found that sequential presentation may eliminate the effects of some types of suggestiveness (subtle clothing clues, for example), reducing false identification rates from 84% to 25%. *Id.* at 133.

the use of a photoarray rather than sequential photos (12% vs. 25%),[147] a field test by three Illinois police departments found that sequential procedures led to more rather than fewer false identifications.[148] Another problem is that when an identification is not made through the sequential method, witnesses are often given a second chance to identify a suspect through a simultaneous lineup, more than erasing any advantage.[149]

The biggest problem, however, is that sequential lineups and other procedures are not sufficient to make eyewitness identifications reliable. Law enforcement organizations who adopt these positive steps are to be commended,[150] but they are using a band-aid on a gaping wound. The best achievable rates for false identifications is around 20%,[151] and any imperfect witnessing condition can result in false identifications rates ranging from 51% to 68%[152] to 90%![153]

III. ELIMINATING EYEWITNESS IDENTIFICATION TESTIMONY WOULD NOT UNREASONABLY BURDEN THE CRIMINAL JUSTICE SYSTEM

Because current proposals do not sufficiently lessen the risk of misidentification, the only rational response to such a high rate of false identifications is to eliminate these identifications from trial. DNA tests can only exonerate those suspects and defendants for whom there is such physical evidence. The vast majority of cases do not involve DNA evidence. There has been some movement to institute new safeguards for the use of eyewitness testimony in capital and other murder cases, but these proposals only seek to remove the elements of suggestion and relative similarity by incorporating Gary

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147. Morgan et al., *supra* note 19, at 272. This counterintuitive result may be anomalous. Multiple repeated tests would be needed to determine whether this result is representative. This needed type of repetition is very rare in the world of eyewitness tests.

148. REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 41 (2006), *available at* www.chicagopolice.org (follow "Illinois Pilot Report on Eyewitness Identification Methods") (statement of Sheri Mecklenburg, Program Director, Illinois State Police).

149. CUTLER & PENROD, *supra* note 7, at 129.

150. *See, e.g.*, THE GUIDE, *supra* note 136; DIV. CRIM. JUST., N.J. OFF. OF ATTORNEY GEN., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

151. CUTLER & PENROD, *supra* note 7, at 129; Gunter Koehnken et al., *Forensic Applications of Line-Up Research*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 205, 227 (Siegfried Sporer et al. eds., 1996). Even in the low stress group for the Navy study, where the subjects viewed the interrogators for 40 minutes at close proximity, the false identification rates more commonly seen were 25% and 38%. Morgan et al., *supra* note 19, at 272.

152. Morgan et al., *supra* note 19, at 272.

153. CUTLER & PENROD, *supra* note 7, at 116-17.

Wells's recommendations.[154] As discussed in the previous section, these proposals improve identification accuracy, but not enough. Furthermore, there is no reason to believe that false identifications are more of a problem in murders than in other violent crimes; in fact, the opposite may be the case.

Victims make up the vast majority of eyewitnesses, and live victims are rare in most homicide cases.[155] This helps to account for the lower number of wrongful capital convictions attributed to false identification.[156] Generally, victims making an identification have been subjected to an extreme amount of stress, which greatly increases the false identification rate.[157]

For about half of all violent crimes, however, eyewitness testimony is extremely reliable because the crime was committed by someone known to the witness, such as a relative.[158] This is why eyewitness identification testimony should only be excluded in those cases where the defendant is a stranger to the witness, the witness is an accomplice,[159] and only in FBI Crime Index felony cases.[160] The Crime Index is simply chosen as a proxy for serious crimes for which the cost of further investigation is outweighed by the benefit of fewer wrongful convictions.

The burden on the criminal justice system would not be all that great. A survey of prosecutors in thirty states resulted in an estimate that only 3% of felony cases are based on eyewitness identifications,[161] and another estimate pegged the number at 5%.[162] If this number is halved to account for those crimes in which the witness previously knew the defendant, only 1.5-2.5% of these cases are based on suspect identifications. Police and other investigators should, of course, be allowed to continue to use identifications as an investigative tool. Surely investigators can find other evidence in those 1.5-2.5% of cases, so that

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154. *See, e.g.*, ILLINOIS GOVERNOR'S OFFICE REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT 31-40 (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_02.pdf.

155. Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 137 (1998).

156. *See supra* notes 46-52 and accompanying text.

157. *See supra* notes 19-24 and accompanying text.

158. Gross, *supra* note 155, at 137.

159. Perjured eyewitness testimony from accomplices accounted for 15, or 32.6%, of the forty-six erroneous identifications discussed by the Center on Wrongful Convictions report. Warden, *supra* note 48.

Professor Gross claims that witness perjury is a "far more common cause of error in murders and other capital cases than in lesser crimes." Gross, *supra* note 155, at 139. He attributes this factor to absence of a live victim to contradict the perjurer. *Id.* at 137-39.

160. FBI, CRIME IN THE U.S. 2003 3 (2004) [hereinafter CRIME].

161. CUTLER & PENROD, *supra* note 7, at 8 (citing A.G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71-74 (1989)).

162. *Id.* (citing Wallace D. Loh, *Psycholegal Research: Past & Present*, 79 MICH. L. REV. 659, 686 (1981)).

these cases can be prosecuted with more reliable evidence.

Murder cases are the least dependent on eyewitness identification testimony, yet they have the highest "clearance" (or arrest and charge) rate of all Crime Index crimes at 62.4%.[163] Police were able to find the evidence needed even without witnesses. The next highest clearance rates were for aggravated assault and rape, both crimes where in many cases, the victim was acquainted with the culprit.[164] And where the crime was committed by a stranger, the police should continue to use the victims' and other witnesses' accounts for investigations. With new investigative techniques, such as the use of DNA testing, police may be able to solve many of these crimes more easily than ever before.

Certainly, there are many cases, including homicides, where there is no other evidence but eyewitness identification. Sometimes, there is not even that. When the crime is especially serious, the pressure to find and convict a culprit is especially high.[165] But where there is no other evidence, the added pressure to get justice for the community may lead to mistakes. These mistakes can be fatal.

CONCLUSION

Eyewitness identification testimony is known to the courts and to psychologists to be extremely unreliable. However, there is great resistance to excluding this type of evidence at trial. The commonsense belief that "seeing is believing" is hard to overcome. The problem is not just that people are being convicted of crimes they did not commit, but that for every wrongful conviction there is a guilty party left to wreak havoc on the public.[166] The only effective way to fix this problem is to exclude eyewitness identification testimony from trials.

After all, the goal is not just to convict someone, but to convict the actual perpetrator of the crime. Current proposals would greatly reduce the number of false identifications but not by enough. When even under the best of circumstances, victims or witnesses who experienced stress will make a mistaken identification around 50% of the time and juries cannot discern the accurate from the false, there is something inherently wrong with using this unreliable identification to convict someone. Identifications are fine as an investigative tool, but if eyewitness identification is all that these cases hang on, we cannot be sure that the real culprits pay for these crimes. The very possibility that such dangerously unreliable evidence is causing innocent people to be executed or imprisoned should counsel against allowing its use in court.

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163. CRIME, *supra* note 160, at 255.

164. U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2002, Statistical Tables, Table 6 (2004), *available at* http://www.albany.edu/sourcebook/pdf/t317.pdf.

165. *See* Gross, *supra* note 155, at 135.

166. HUFF ET AL., *supra* note 10, at 150.

IMPLEMENTING *RAPANOS*—WILL JUSTICE KENNEDY'S SIGNIFICANT NEXUS TEST PROVIDE A WORKABLE STANDARD FOR LOWER COURTS, REGULATORS, AND DEVELOPERS?

BRADFORD C. MANK*

INTRODUCTION

In 2001, the Supreme Court in *Solid Waste Agency of Northern Cook County ("SWANCC") v. United States Army Corps of Engineers*[1] held that the United States Army Corps of Engineers (Corps) lacked authority under the 1972 Clean Water Act ("CWA" or "the Act")[2] to regulate wetlands and waters that serve as habitat for migratory birds when those waters are isolated from navigable waters.[3] The Court concluded that Congress intended that the CWA's jurisdiction be limited to navigable waters and non-navigable waters that have a "significant nexus" to navigable waters, including wetlands adjacent to navigable waters.[4] *SWANCC* did not address the Corps' regulation of wetlands near non-navigable tributaries that flow into navigable rivers or wetlands that are not immediately adjacent to navigable waters but have some hydrological or ecological connection to navigable waters.[5]

After *SWANCC*, the federal circuit courts of appeals were divided over when the Corps may regulate what one may call for simplicity "tributary wetlands."[6] Six of the circuit courts of appeal limited *SWANCC* to its facts and allowed the Corps to regulate tributary wetlands, or similar wetlands, if there is any hydrological connection between them and navigable waters and sometimes when there is only an ecological connection.[7] The Fifth Circuit, however, interpreted *SWANCC* as limiting the Corps' jurisdiction to regulate wetlands adjacent to navigable waters.[8] In a 2003 article, this author proposed the

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1. 531 U.S. 159 (2001).

2. *See generally* Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. 1251-1387 (2000).

3. *SWANCC*, 531 U.S. at 167-68.

4. *Id.* (explaining the Court's prior decision in United States v. Riverside Bayview Homes, 474 U.S. 121, 131-32 (1985), which requires that a "significant nexus" exist between adjacent wetlands and navigable waters in order for the Corps to have the authority to regulate); Bradford C. Mank, *The Murky Future of the Clean Water Act After* SWANCC*: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 848 (2003) (discussing significant nexus test).

5. In *Riverside Bayview Homes*, 474 U.S. at 129, the Supreme Court held that the CWA gives the Corps authority to regulate wetlands adjacent to navigable waters.

6. *See* Mank, *supra* note 4, at 860-79.

7. *See infra* note 417 and accompanying text.

8. Rice v. Harken Exploration Co., 250 F.3d 264, 268-69 (5th Cir. 2001) ("[U]nder

intermediate position "that courts should interpret the Act to include non-navigable waters, wetlands, or tributaries that possess a significant hydrological connection or nexus with navigable waters."[9] The First, Fourth, Fifth, Sixth, and Tenth Circuits have recognized the significant nexus test as the key test for determining the Act's jurisdiction, although the Ninth Circuit has concluded that case-by-case application of that test is not required.[10]

In 2006, the Supreme Court in *Rapanos v. United States*,[11] a decision consolidating two appeals from the Sixth Circuit: *United States v. Rapanos*[12] and *Carabell v. United States Army Corps of Engineers*[13] finally addressed the question of jurisdiction over tributary wetlands or non-adjacent wetlands, but the Court was unable to provide clear answers.[14] In *Carabell*, the Sixth Circuit Court of Appeals held that a wetland separated by a manmade berm from a ditch that connects through tributaries to navigable waters still qualifies for CWA protection, even though there was only an occasional hydrological connection between the wetland and the ditch.[15] In *Rapanos*, the Sixth Circuit ruled that non-navigable wetlands that are adjacent to non-navigable tributaries are subject to CWA jurisdiction, although the only connection between wetlands at issue and actually navigable waters is by way of twenty miles of non-navigable tributaries.[16]

In *Rapanos*, the Supreme Court fractured into four-to-one-to-four blocs, although a majority of five agreed to vacate and remand the two Sixth Circuit decisions.[17] Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, issued the judgment of the Court and wrote a plurality opinion that would have sharply restricted CWA jurisdiction to only those waters that are "relatively permanent, standing or continuously flowing" or to wetlands that have a physical surface water connection to these waters.[18] Justice Scalia relied on dictionary definitions to discern the meaning of the statutory text.[19] The plurality opinion is the nominal opinion of the Court because it ordered vacating and

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[*SWANCC*], it appears that a body of water is subject to regulation under the [Act] if the body of water is actually navigable or is adjacent to an open body of navigable water."); *see In re* Needham, 354 F.3d 346, 347 (5th Cir. 2003); *infra* notes 346, 400-03, 413-14 and accompanying text.

9. Mank, *supra* note 4, at 821-22, 883-91; *see also* FD & P Enters. v. U.S. Army Corps of Eng'rs, 239 F. Supp. 2d 509, 513-17 (D.N.J. 2003) (stating that *SWANCC* "has substantially altered the meaning of "'navigable waters' in the [FWPCA and, therefore,] a 'significant nexus' must constitute more than a mere 'hydrological connection'").

10. *See infra* notes 346-50 and accompanying text.

11. 126 S. Ct. 2208 (2006).

12. 376 F.3d 629 (6th Cir. 2004), *vacated and remanded*, 126 S. Ct. 2208 (2006).

13. 391 F.3d 704 (6th Cir. 2004), *vacated and remanded*, 126 S. Ct. 2208 (2006).

14. *Rapanos*, 126 S. Ct. at 2220-27.

15. *Carabell*, 391 F.3d at 708-09.

16. *Rapanos*, 376 F.3d at 643-44.

17. *Rapanos*, 126 S. Ct. at 2219.

18. *Id.* at 2220-25.

19. *Id.* at 2220-21.

remanding the two decisions, and as a practical matter, the plurality opinion will not serve in most cases as precedent for lower courts.[20] Because Justice Kennedy's concurrence disagrees with the plurality opinion in many ways, most lower courts may treat Justice Scalia's opinion more like a dissenting opinion than a majority opinion.[21]

On the other side, Justice Stevens in his dissenting opinion, joined by Justices Souter, Ginsburg and Breyer would have upheld the Corps' broad jurisdiction over "tributary wetlands."[22] Justice Stevens emphasized the statute's ecological purposes and the importance of deferring to the interpretation of expert executive agencies.[23] Justice Kennedy was less deferential to the Corps' interpretation, but his focus on the Act's ecological purposes is closer to the dissenting opinion than it is to Justice Scalia's restrictive reading of the Act.[24]

According to most, but not all, commentators, the key opinion was Justice Kennedy's lone opinion concurring in the judgment, which joined Justice Scalia's opinion only in vacating and remanding the two decisions.[25] Justice Kennedy being at the center of the Court is not surprising. In a number of cases involving federalism and national power, he has staked a position in the middle between conservatives, who are often led by Justice Scalia, and liberals, who are often led by Justice Stevens.[26] Kennedy concluded that the CWA's jurisdiction reached waters and wetlands with a "significant nexus" to actually navigable waters.[27] He balanced the CWA's broad ecological purposes against its

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20. *Id.* at 2265 (Stevens, J., dissenting); *see also* Michael C. Dorf, Commentary, *In the Wetlands Case, the Supreme Court Divides Over the Clean Water Act—and Seemingly Over How to Read Statutes as Well* (June 21, 2006), http://writ.lp.findlaw.com/dorf/20060621.html.

21. Linda Greenhouse, *Justices Divided on Protections Over Wetlands*, N.Y. TIMES, June 20, 2006 ("Justice Scalia's opinion reads like a dissent.").

22. *Rapanos*, 126 S. Ct. at 2252-65 (Stevens, J., dissenting).

23. *Id.* at 2262-63.

24. *See* Dorf, *supra* note 20; Posting of Amy Howe to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2006/06/more_on_rapanos.html (June 19, 2006, 13:54 EST) (quoting William Buzbee).

25. *Recent Supreme Court Decisions Regarding the Clean Water Act:* Rapanos v. United States *and* Carabell v. U.S. Corps of Engineers*: Hearing Before the Sen. Comm. on Environ. and Pub. Works*, 109th Cong. 26 (2006) (statement of William W. Buzbee, Professor of Law, Emory Law School), *available at* http://epw.senate.gov/109th/Buzbee_Testimony.pdf [hereinafter Buzbee Statement]; Amena H. Saiyid, *Lawyers Say Supreme Court Did Not Resolve Question of Authority of Corps of Engineers,* 37 ENVT. REP. (BNA) 1329 (June 23, 2006) (reporting that Professors Jonathan Adler and Patrick Parentau believe Justice Kennedy's opinion will carry the most weight with lower courts, but that attorney R. Lee Stephens argued "[i]n a plurality opinion, a clever litigator can turn it any way."); Posting of Doug Kendall to The Blog of the American Constitutional Law Society, http://www.acsblog.org/guest-bloggers-2907-guest-blogger-doug-kendall-on-rapanos-and-federalism.html (June 20, 2006, 14:45 EST).

26. Louis D. Bilionis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. REV. 1353, 1354, 1376 (2005).

27. *Rapanos*, 126 S. Ct. at 2241; *see infra* notes 156-57, 232-34 and accompanying text.

limitation of using the term "navigable waters."[28] He explained that waters or wetlands have this nexus if they significantly affect the ecological or hydrological integrity of navigable waters.[29] Thus, waters or wetlands that are not adjacent to navigable waters are protected if they have a significant impact on actually navigable waters.[30] Waters or wetlands with a less significant connection with actually navigable waters would not be protected.[31] Under Kennedy's approach, lower courts will have to engage in a case-by-case analysis to determine whether a significant nexus links wetlands to navigable waters.[32] Because he asserted that the Corps and lower courts may consider broad ecological connections among wetlands and navigable waters in determining whether there is a significant nexus between them, Justice Kennedy's opinion suggests that the Corps will be able to regulate many of the "tributary wetlands" that it had asserted jurisdiction over before the *Rapanos* decision.[33]

Justice Kennedy's significant nexus test has both the advantages and disadvantages of comprehensiveness. His approach looks at both the physical hydrological connection between wetlands and navigable waters as well as broader ecological connections.[34] A test limited to the physical hydrological connections would have been easier to apply.[35] By requiring consideration of ecological connections, he places a much heavier burden on the Corps and lower courts to examine complex biological relationships between wetlands and navigable waters. His test in most cases will produce the same result as Justice Stevens in his dissenting opinion.[36] It would have been easier if Justice Kennedy had simply joined the dissenting opinion.[37] Nevertheless, Justice Kennedy likely felt constrained by his vote with the *SWANCC* majority opinion not to join the *Rapanos* dissenting opinion.[38] Justice Kennedy had to remain true to *SWANCC's* underlying principle that the Act is limited to waters that have some meaningful connection to navigable waters.[39]

There is disagreement about which opinions in *Rapanos* are binding on lower courts. Chief Justice Roberts in his solo concurring opinion mentioned the rule in *Marks v. United States*,[40] which held that when the Supreme Court issues a fragmented decision, those members who concur "on the narrowest grounds"

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28. *Rapanos*, 126 S. Ct. at 2248-49; *see infra* notes 269, 275 and accompanying text.
29. *See infra* notes 254, 268-69 and accompanying text.
30. *See infra* note 255 and accompanying text.
31. *Rapanos*, 126 S. Ct. at 2249; *see infra* note 277 and accompanying text.
32. *See infra* notes 255-57 and accompanying text.
33. *See infra* notes 157, 217-20, 329-31, 360, 488 and accompanying text.
34. *See infra* note 318 and accompanying text.
35. *See infra* notes 354-59 and accompanying text.
36. *See infra* notes 363, 464 and accompanying text.
37. *See infra* note 363 and accompanying text.
38. *See infra* notes 232-33, 241 and accompanying text.
39. *See infra* notes 234, 243-45, 266 and accompanying text.
40. 430 U.S. 188, 193-94 (1977).

have the controlling opinion.[41] He did not address which opinion would control the lower courts.[42] Justice Stevens's dissent stated that because the four dissenting votes agreed that the government's broad regulation of tributary wetlands was valid the government should have jurisdiction over tributary wetlands if the wetlands at issue meet either the plurality's test or Justice Kennedy's significant nexus standard because there would be a working majority of at least five votes, including dissenting votes.[43] Professor Adler has interpreted the *Marks* decision to require lower courts to follow those portions of the *Rapanos* decision where the plurality opinion and Justice Kennedy agree and to forbid lower courts from considering the dissenting opinion.[44] Professor Buzbee, by contrast, argues that *Marks* allows lower courts to consider the numerous points upon which the dissenting opinion and Justice Kennedy's opinion form a five vote majority.[45] In its Motion for Remand in the *Rapanos* case, the Department of Justice ("DOJ") cited *Marks* in agreeing with Justice Stevens's dual approach that the government should have jurisdiction over wetlands if the wetlands at issue meet either the plurality's test or Justice Kennedy's "significant nexus" standard.[46]

The first lower court decision decided after *Rapanos* did not follow Justice Kennedy's significant nexus test. In *United States v. Chevron Pipe Line Co.*,[47] the U.S. District Court for the Northern District of Texas on June 28, 2006 criticized the significant nexus test in Justice Kennedy's *Rapanos* concurrence as too vague and subjective to provide guidance. Instead the court followed the Fifth Circuit's prior precedent that had narrowly construed the Act in an approach closer to the plurality opinion.[48] In August 2006, however, the Ninth Circuit in *Northern California River Watch v. City of Healdsburg*[49] followed Justice Kennedy's test.[50] In September 2006, the Seventh Circuit in *United States v. Gerke Excavating, Inc.*[51] stated that Justice Kennedy's test should be followed except in the rare case when the plurality's approach would give greater federal jurisdiction under the CWA.[52] Four other circuits are also likely to follow the significant nexus test based on their prior pre-*Rapanos* precedent.[53]

On remand, the Sixth Circuit and its district courts are likely to apply Justice

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41. *See infra* note 298 and accompanying text.
42. *See infra* note 298 and accompanying text.
43. *See infra* notes 226-27 and accompanying text.
44. *See infra* note 457 and accompanying text.
45. *See infra* notes 461-64 and accompanying text.
46. *See infra* notes 441-42 and accompanying text.
47. 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).
48. *Id.* at 613.
49. 457 F.3d 1023 (9th Cir. 2006).
50. *Id.* at 1029-30.
51. 464 F.3d 723 (7th Cir. 2006) (per curiam). The Seventh Circuit remanded the case to the district court to apply Justice Kennedy's significant nexus test to the facts of the case. *Id.* at 725.
52. *Id.*
53. *See infra* note 417 and accompanying text.

Kennedy's significant nexus test in determining whether the government has proven a sufficient connection between the wetlands on Rapanos and Carabell's properties and navigable waters.[54] Justice Kennedy suggested that there may be sufficient evidence of such a nexus for the government to win both cases. He also implied that the final result after the remand would likely be closer to Stevens's dissenting opinion than the plurality opinion.[55]

The Corps and EPA (the "Agencies") have promised to issue new joint guidance in the near future to address the scope of the Act in the wake of *Rapanos*, but it is unclear whether the Agencies will issue detailed regulations in this area. After the *SWANCC* decision, in 2001, the Agencies had announced their intention of issuing new wetlands rules. In 2003, however, the Agencies abandoned their attempt to develop new wetlands regulations.[56] There are serious disagreements between developers and conservationists about the scope of the Act and those disagreements remain a serious obstacle to the agencies developing new regulations.[57] Yet Justice Kennedy's significant nexus test could provide a workable framework for new regulations, and thus, there is a better opportunity after *Rapanos* for the agencies to develop new regulations.[58]

Section II will provide a brief history of federal regulation of "navigable waters," the passage of the Act, the Corps' regulations, the *SWANCC* decision, and the agencies' failure to issue new regulations. Section III will analyze the main *Rapanos* opinions of Justice Scalia, Justice Stevens and Justice Kennedy, as well as the briefer opinions of Chief Justice Roberts and Justice Breyer. Section IV will examine the Texas District Court decision, the likely response in other Circuits, and how quickly the Corps is likely to issue new wetlands regulations.

I. FEDERAL REGULATION OF NAVIGABLE WATERS AND WETLANDS

A. Regulation of Navigable Waters

The Constitution does not expressly authorize federal regulation of navigation, but Congress' authority over navigation has long been recognized through its authority under the Commerce Clause of the Constitution to "regulate Commerce with foreign Nations, and among the several States."[59] In 1824, Chief Justice Marshall in *Gibbons v. Ogden*[60] held that Congress had authority under the Commerce Clause to license steamboat operations in New York waters because Congress had the implied power to regulate navigation to facilitate its

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54. *See infra* notes 284-92, 417 and accompanying text.
55. *See infra* notes 312, 387-88, 464 and accompanying text.
56. *See infra* note 148 and accompanying text.
57. *See infra* note 150 and accompanying text.
58. *See infra* notes 276, 436, 489 and accompanying text.
59. U.S. CONST. art. I, § 8, cl. 3; Mank, *supra* note 4, at 824.
60. 22 U.S. (9 Wheat.) 1, 189-90 (1824).

authority over interstate commerce.[61] During the nineteenth century, the Court limited federal authority over navigable waters to waters that were navigable in fact.[62] In 1871, the Court in *The Daniel Ball*[63] defined navigable waters of the United States as those interstate waters that are "navigable in fact" or readily susceptible of being rendered so.[64]

Beginning in 1937, courts broadened their interpretation of Congress's authority over interstate commerce, which in turn led courts to expand the federal navigation power as well.[65] In its 1940 decision *United States v. Appalachian Electric Power Co.*,[66] the Supreme Court broadened the definition of navigable waters to include those susceptible to navigation with "reasonable improvement."[67] More importantly, the Court recognized that Congress has authority under the Commerce Clause to regulate non-navigable waters that have significant effects on interstate Commerce.

> [I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . [The] authority is as broad as the needs of commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government.[68]

After the *Appalachian Power* decision, courts gradually expanded the range of circumstances in which the federal government has authority over non-navigable tributaries of navigable waters.[69] In the 1965 decision *Federal Power Commission v. Union Electric Co.*,[70] the Supreme Court held that the Federal Power Commission's authority over power-generation facilities extended to non-navigable waters as well, determining that the Commerce Clause applies to non-navigable waters.[71]

In the 1979 decision *Kaiser Aetna v. United States*,[72] Justice Rehnquist stated that Congress can regulate non-navigable waters under the Commerce Clause.[73]

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61. *Id.*; Mank, *supra* note 4, at 824.
62. Mank, *supra* note 4, at 826.
63. 77 U.S. (10 Wall.) 557 (1870).
64. *Id.* at 563; United States v. Rapanos, 126 S. Ct. 2208, 2216 (2006).
65. Mank, *supra* note 4, at 828-30.
66. 311 U.S. 377 (1940).
67. *Id.* at 408-09.
68. *Id.* at 426-27.
69. Mank, *supra* note 4, at 829-30.
70. 381 U.S. 90 (1965).
71. *Id.* at 97-110; Mank, *supra* note 4, at 830.
72. 444 U.S. 164 (1979).
73. *Id.* at 174; Mank, *supra* note 4, at 832-33.

He observed that the "navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce."[74] Instead, Justice Rehnquist focused on the effect waters or other economic activities have on interstate commerce.[75] In particular, he found that economic activities that affect interstate commerce "are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved."[76] A key issue is whether Congress in the CWA intended to reach the furthest limits of its authority under the Commerce Clause.

B. The 1972 Clean Water Act

In the 1972 CWA, Congress adopted a comprehensive approach to regulating pollution and improving the quality of the nation's waters.[77] The statute's goal is the "[r]estoration and maintenance of chemical, physical and biological integrity of Nation's waters" for current and future generations.[78] Section 404 of the Act protects wetlands by requiring all persons to obtain a permit from the Corps "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[79] The Corps plays the primary role in issuing Section 404 permits, but the EPA has authority to veto a Corps' permit or an approved State or Tribe permit, although the EPA's exercise of its veto authority is rare.[80]

The Act delineates its jurisdiction to include navigable waters, which the Act then defines as "the waters of the United States, including the territorial seas."[81] The joint House-Senate Conference Report for the Act explained that "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[82] In its

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74. *Kaiser Aetna*, 444 U.S. 173.

75. Mank, *supra* note 4, at 832-33.

76. *Kaiser Aetna*, 444 U.S. at 174.

77. Mank, *supra* note 4, at 831.

78. 33 U.S.C. § 1251(a) (2000).

79. *Id.* § 1344(a).

80. *Id.* § 1344(c) ("The [EPA] Administrator is authorized to prohibit the specification . . . of any defined area as a disposal site . . . whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."); *see also* James City County v. EPA, 12 F.3d 1330 (4th Cir. 1993) (upholding EPA's veto under § 404(c) of Corps § 404(b) permit); Mank, *supra* note 4, at 814 n.6; Lance D. Wood, *Section 404: Federal Wetland Regulation Is Essential*, 7 NAT. RESOURCES & ENV'T 7 (1992) (observing that the EPA rarely uses its veto power over Corps wetlands permits).

81. 33 U.S.C. § 1362(7) (2000).

82. S. REP. NO. 92-1236, at 144 (1972), *as reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 327 (1973).

1974 decision *United States v. Ashland Oil & Transportation Co.*,[83] the Sixth Circuit interpreted the Conference Report's language to mean that Congress intended that the Act reach all waters that substantially affect interstate commerce.[84] Nevertheless, some courts and commentators have continued to argue that Congress in the 1972 Act intended the term "waters of the United States" to include only actually or potentially navigable waters.[85]

A number of provisions in the 1972 CWA suggest Congress intended to regulate some non-navigable waters.[86] Although some sections of the CWA refer specifically to navigable waters,[87] the statute defines the term to include the waters of the United States without any further reference to navigability.[88] The House Bill for the 1972 Act had defined navigable waters as the "navigable waters of the United States, including the territorial seas,"[89] but the final Conference Bill eliminated the word navigable.[90] The EPA and the Corps have each argued that this deletion is strong evidence that Congress intended to expand the Act's definition beyond navigable waters.[91] Additionally, other sections of the Act go beyond interstate navigable waters to include "intrastate waters"[92] and "any waters."[93]

Some commentators, however, argue that the Conference Report for the Act demonstrates that Congress intended to require only the broadest constitutional authority over traditional navigable waters.[94] In *SWANCC*, the government acknowledged that it was "somewhat ambiguous" whether the conferees' language sought to reach the broadest possible limits of navigability or of the

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83. 504 F.2d 1317 (6th Cir. 1974).

84. *Id.* at 1325; *see also* Philip Weinberg, *It's Time For Congress to Rearm the Army Corps of Engineers: A Response to the Solid Waste Agency Decision*, 20 VA. ENVTL. L.J. 531, 535 (2001) (maintaining Congress intended in 1972 Act to employ its full authority under the Commerce Clause to regulate both navigable and non-navigable waters).

85. Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. 11042, 11046-49 (2002) (contending that Congress in the 1972 Act sought only to regulate potentially navigable waters).

86. Mank, *supra* note 4, at 831-32.

87. 33 U.S.C. § 1344 (2000).

88. *See, e.g.*, 33 U.S.C. § 1312(a) (establishing water quality-related effluent limitations for "navigable waters"); *see also id.* § 1362(7); Mank, *supra* note 4, at 831-32; Weinberg, *supra* note 84, at 535.

89. H.R. 11896, 92nd Cong. 502(8) (1972).

90. Albrecht & Nickelsburg, *supra* note 85, at 11047; Mank, *supra* note 4, at 832.

91. Albrecht & Nickelsburg, *supra* note 85, at 11047; Mank, *supra* note 4, at 832.

92. 33 U.S.C. § 1313(a)(2) (2000) (stating EPA must approve state water quality standards for intrastate waters); Mank, *supra* note 4, at 832; Weinberg, *supra* note 84, at 535.

93. 33 U.S.C. § 1317(a)(2) (2000) (stating that EPA effluent limitations for toxic pollutants "shall take into account the . . . presence of the affected organisms in any waters"); Mank, *supra* note 4, at 832; Weinberg, *supra* note 84, at 535.

94. Albrecht & Nickelsburg, *supra* note 85, at 11047; Mank, *supra* note 4, at 833.

Commerce Clause.[95] In light of Congress's concern during the early 1970s that the Corps failed to interpret its authority under the 1899 River and Harbor Act[96] to the fullest possible limits of navigable waters, some commentators contend that Congress more likely intended the 1972 Act only to reach all actually or potentially navigable waters rather than whatever non-navigable waters Congress might be able to regulate under the Commerce Clause.[97]

C. The Corps Wetlands Regulations

1. The EPA and the Corps Initially Disagreed About the Act's Jurisdiction.—From 1972 until 1975, the EPA and the Corps disagreed about the scope of the Act's jurisdiction.[98] In 1973, the EPA's general counsel issued an opinion stating that the "the deletion of the word 'navigable' [in the 1972 Act] eliminates the requirement of navigability. The only remaining requirement, then, is that pollution of waters covered by the bill must be capable of affecting interstate commerce."[99] In May 1973, the EPA promulgated regulations defining navigable waters requiring a CWA permit to include several types of non-navigable waters.[100]

The Corps, by contrast, defined the CWA's jurisdiction as only "the broadest possible definition of actually and potentially navigable waters."[101] In a 1974 rule addressing its jurisdiction under Section 404 of the Act, the Corps construed the 1972 FWPCA Conference Report's statement that the Act should be interpreted according to "the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes" to refer to prior judicial precedents addressing the constitutional limits of actually or potentially navigable waters.[102] The Corps'

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95. Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 157, 168 n.3 (2001) (citing Brief for Federal Respondents at 24); Mank, *supra* note 4, at 833.

96. River and Harbor Act of 1899, ch. 425, 30 Stat. 1151 (codified as amended at 33 U.S.C. § 401 (2000)); Mank, *supra* note 4, at 827-28.

97. Albrecht & Nickelsburg, *supra* note 85, at 11047; Mank, *supra* note 4, at 833.

98. Albrecht & Nickelsburg, *supra* note 85, at 11049-50; Mank, *supra* note 4, at 833-34.

99. Albrecht & Nickelsburg, *supra* note 85, at 1049 (quoting EPA General Counsel Opinion (Feb. 6, 1973)).

100. National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,528-29 (May 22, 1973); Mank, *supra* note 4, at 833-34. The regulation defined CWA jurisdiction to include:

> (1) All navigable waters of the United States; (2) Tributaries of navigable waters of the United States; (3) Interstate waters; (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

National Pollutant Discharge Elimination System, 38 Fed. Reg. at 13,529.

101. Mank, *supra* note 4, at 834 (citing Albrecht & Nickelsburg, *supra* note 85, at 11050).

102. *Id.* (citing 33 C.F.R. § 209.120(d)(1) (1974)).

1974 regulations defined "navigable waters" as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[103]

2. The Corps' 1975 Interim and 1977 Final Regulations Expand the CWA's Jurisdiction.—"In the 1975 decision *Natural Resources Defense Council[, Inc.] v. Callaway*, the United States District Court for the District of Columbia held that the Corps' definition of 'navigable waters' was unduly limited and violated the FWPCA."[104] "The court concluded that Congress 'asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.'"[105] Accordingly, "the term [navigable waters] is not limited to the traditional tests of navigability."[106]

In response to the *Callaway* decision's order requiring it to issue new regulations,[107] the Corps issued interim regulations in 1975 that defined "navigable waters" to include intrastate lakes, rivers and streams that are used by interstate travelers or in interstate commerce; non-navigable tributaries; and "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters."[108] In 1977, the Corps issued a final rule that included all of the categories of waters in the interim rule and also included isolated wetlands and waters whose degradation or destruction could affect interstate commerce.[109] In the 1977 amendments to the Act, Congress considered bills that would have clarified the definition of navigable waters in the statute or the scope of the Act's jurisdiction, but it failed to pass any of these amendments.[110]

D. Riverside Bayview*: Providing Support for Broader Agency Jurisdiction*

"In the 1985 decision *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court held that the Corps had jurisdiction over non-navigable wetlands that are adjacent to navigable waters because they are 'waters of the United States' as defined by the Act."[111] The Court concluded that the agencies' regulation of "any adjacent wetlands that form the border of or are in reasonable

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103. *Id.*

104. Mank, *supra* note 4, at 834 (citing Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975)).

105. *Id.* (quoting *Callaway*, 392 F. Supp. at 686).

106. *Id.*

107. *See Callaway*, 392 F. Supp. at 686.

108. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975); *see also* Mank, *supra* note 4, at 835.

109. *See* Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977); *see also* Mank, *supra* note 4, at 835.

110. *See* Mank, *supra* note 4, at 836.

111. *Id.* at 837-40 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985)).

proximity to other waters of the United States" was valid under the Act.[112] The wetlands at issue were adjacent to and partly abutted a navigable creek.[113] "The *Riverside Bayview* Court concluded that the term 'navigable' is of 'limited import' and that Congress sought 'to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.'"[114] Based on the Act's goals and legislative history, the Court concluded that Congress sought to regulate some non-navigable waters, especially waters such as adjacent wetlands that often have substantial hydrological or ecological impacts on navigable waters.[115]

"The *Riverside Bayview* Court emphasized the importance of hydrological and biological interactions between adjacent wetlands and navigable waters in determining that adjacent wetlands are within the scope of the Act."[116] The Court conceded that some adjacent wetlands might not have significant hydrological and ecological relationships with navigable waters, but determined that the Corps' regulation was valid because substantial interactions exist for most adjacent wetlands.[117] "The Court emphasized that the agencies' 'technical expertise' and 'ecological judgment' in determining the relationship 'between waters and their adjacent wetlands provide[] an adequate basis for a legal judgment that adjacent wetlands' are covered by the Act."[118] Additionally, the Court concluded that the Corps had jurisdiction over adjacent wetlands because there was evidence that Congress, in enacting the 1977 Amendments to the Act, had acquiesced to the Corps' regulations applying the Act to adjacent wetlands because even an unsuccessful bill that proposed to limit the Corps' jurisdiction to traditional navigable waters had not sought to exclude the Corps' regulation of wetlands adjacent to navigable waters.[119]

E. SWANCC

In the 2001 *SWANCC* decision, the Court invalidated the Corps' 1986 Migratory Bird "Rule,"[120] which sought to regulate all wetlands and waters that

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112. *Riverside Bayview*, 474 U.S. at 134 (quoting Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,128 (1977)).

113. *Id.* at 135.

114. Mank, *supra* note 4, at 838 (quoting *Riverside Bayview*, 474 U.S. at 133).

115. *See Riverside Bayview*, 474 U.S. at 129-35; *see also* Mank, *supra* note 4, at 837-38.

116. Mank, *supra* note 4, at 840 (citing *Riverside Bayview*, 474 U.S. at 132-35).

117. *Riverside Bayview*, 474 U.S. at 135 n.9; *see also* Mank, *supra* note 4, at 840.

118. Mank, *supra* note 4, at 838 (citing *Riverside Bayview*, 474 U.S. at 134).

119. *See Riverside Bayview*, 474 U.S. at 136-39; *see also* Mank, *supra* note 4, at 839.

120. The so-called Migratory Bird "Rule" was contained in the preamble of 1986 Corps regulations interpreting the scope of the Corps existing wetland regulations. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (interpreting 33 C.F.R. § 328.3 (2005)); Albrecht & Nickelsburg, *supra* note 85, at 11042 n.2, 11052; Mank, *supra* note 4, at 842-43. In 1988, the EPA included the same Migratory Bird "Rule" in the preamble of one its regulations. *See* Clean Water Act Section 404 Program Definitions and

serve as habitat for migratory birds because the Corps exceeded the Act's jurisdiction in attempting to regulate waters "isolated" from navigable waters.[121] The Court concluded that Congress intended that the Act's jurisdiction be limited to navigable waters and non-navigable waters that have a "significant nexus" to navigable waters, including wetlands adjacent to navigable waters.[122] Although the *Riverside Bayview* decision had stated that navigability was of limited import in determining the Act's scope, the *SWANCC* Court stated that the relationship of waters to navigability was still an important factor in determining whether particular waters were within the Act's jurisdiction,

> it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[123]

Based on its reading of the statute's text, the Court concluded that the term "navigable waters" did not encompass "isolated" wetlands or waters because navigability is a central factor in determining the Act's jurisdiction.[124] As support for its "navigability" interpretation, the Court observed that the Corps' original 1974 interpretation of the Act has defined the Act's jurisdiction as waters that are potentially navigable.[125] The Court rejected the government's argument that even if the 1972 Congress had intended to cover only navigable waters that Congress in enacting the 1977 Amendments had acquiesced in the Corps' broader regulatory definition in the 1977 regulations or the subsequent 1986 Migratory Bird "Rule."[126]

Although it did not actually decide whether Congress has authority under the Commerce Clause to regulate isolated waters, the Court stated that one reason that it refused to defer to the government's interpretation of the Act in the Migratory Bird "Rule" was due to its serious doubts about whether the regulation was within the scope of the congressional commerce power.[127] "The *SWANCC* Court rejected the government's argument that the Corps' interpretation was entitled to deference under the *Chevron* doctrine, which states that courts should usually defer to an agency's reasonable interpretation of an ambiguous statute for which Congress has delegated authority to the agency."[128] The Court concluded

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Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764, 20,764-65 (June 6, 1988).

121. Solid Waste Agency of N. Cook County (SWANCC) v. Army Corps of Eng'rs, 531 U.S. 157, 171-72 (2001).

122. *See id.* at 167-68; *see also* Mank, *supra* note 4, at 847-48.

123. *SWANCC*, 531 U.S. at 172.

124. *Id.* at 167-68; Mank, *supra* note 4, at 846-54.

125. *SWANCC*, 531 U.S. at 168; *see also* Mank, *supra* note 4, at 852-53.

126. *SWANCC*, 531 U.S. at 168-71; *see* Mank, *supra* note 4, at 848-49.

127. *See SWANCC*, 531 U.S. at 173-74; Mank, *supra* note 4, at 849-52.

128. *See SWANCC*, 531 U.S. at 172-74; Mank, *supra* note 4, at 841; *see also* Chevron U.S.A.,

that "we find 404(a) to be clear" and, "even were we to agree with respondents [that the statute is ambiguous], we would not extend *Chevron* deference here."[129]

"The Court applies an exception to the [*Chevron*] doctrine when an agency's interpretation raises serious constitutional questions; the Court places the burden of proof on the agency to demonstrate that Congress intended a statute to reach the broadest limits of congressional authority under the Constitution."[130] The Court stated, "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[131] Additionally, the Court observed, "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," in this case local regulation of land use.[132] The Court did not find any "clear indication" that Congress intended the Act to regulate isolated waters, stating "[t]hese are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here."[133] Accordingly, the *SWANCC* majority rejected the government's broad interpretation of the Act to include isolated waters. "We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference."[134]

The voting of the Court's justices in *SWANCC* had important implications for the vote in *Rapanos*. Chief Justice Rehnquist wrote the *SWANCC* majority opinion, joined by Justices O'Connor, Scalia, Kennedy and Thomas.[135] Chief Justice Rehnquist died and Justice O'Connor retired before the *Rapanos* decision. They were replaced by Chief Justice Roberts and Justice Alito. As Part III will discuss, Justice Kennedy and Justice Scalia, joined by Justice Thomas, disagreed about the implications of *SWANCC* when they addressed the different facts in *Rapanos*. Justices Stevens, Souter, Ginsburg, and Breyer dissented.[136] These same four Justices also dissented in *Rapanos*.

Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that courts should defer to an agency's interpretation of a statute for which Congress has delegated authority if the statute is ambiguous and the agency's interpretation is permissible, or, in other words, reasonable).

129. *SWANCC*, 531 U.S. at 174; *see* Mank, *supra* note 4, at 851.

130. *SWANCC*, 531 U.S. at 172-74; *see also* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988); Mank, *supra* note 4, at 851-52 n.256.

131. *SWANCC*, 531 U.S. at 172; *see* Mank, *supra* note 4, at 850-52.

132. *SWANCC*, 531 U.S. at 173; *see* Mank, *supra* note 4, at 850-52.

133. *SWANCC*, 531 U.S. at 174; *see* Mank, *supra* note 4, at 850-52.

134. *SWANCC*, 531 U.S. at 174.

135. *Id.* at 161.

136. *Id.* at 174 (Stevens, J., dissenting).

F. The EPA's and the Corps' 2001 Joint Memorandum on SWANCC *and 2003 Advance Notice of Proposed Rule Making*

On January 19, 2001, the last full day of the Clinton administration, the Agencies issued a joint memorandum written by Gary S. Guzy, General Counsel of the EPA, and Robert M. Andersen, Chief Counsel of the Corps, adopting the narrow interpretation that *SWANCC* limited the agencies' regulatory authority only over waters in which their jurisdiction was based solely on the presence of migratory birds.[137] The 2001 joint memorandum took a broad interpretation of which waters are within the Act's jurisdiction after the *SWANCC* decision.[138] The memorandum stated that *SWANCC* had not overruled the holding or rationale of *Riverside Bayview*, which the memorandum claimed had "upheld the regulation of traditionally navigable waters, interstate waters, their tributaries and wetlands adjacent to each."[139] Additionally, the memorandum contended that even "waters that are isolated, intrastate, and nonnavigable," may still be within the Act's jurisdiction "if their use, degradation, or destruction could affect other 'waters of the United States,' thus establishing a significant nexus between the water in question and other 'waters of the United States.'"[140] The joint memorandum's use of the term significant nexus test was clearly based on its use in *SWANCC*.[141]

On January 15, 2003, during President George W. Bush's Administration, the EPA and the Corps published in the Federal Register an Advance Notice of Proposed Rule Making (ANPRM) to solicit public comment for forty-five days to clarify the extent of the Act's jurisdiction in light of *SWANCC*.[142] The Agencies also issued a new joint memorandum, or guidance attached as Appendix A to the ANPRM, which superseded the 2001 joint memorandum, on how field staff should address jurisdictional issues until the agencies issue a final rule on the subject.[143] The most significant change in the revised 2003 joint memorandum from its 2001 predecessor is that field staff must receive "formal project-specific [] approval" from agency headquarters before claiming jurisdiction over any isolated, non-navigable, intrastate waters.[144] "Because *SWANCC* did not directly address tributaries, the Corps notified its field staff

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137. Memorandum from Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency, and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers 2-3 (Jan. 19, 2001) [hereinafter 2001 Joint Memorandum], *available at* http://www.aswm.org/fwp/swancc/legal.pdf; *see* Mank, *supra* note 4, at 858-60.

138. Mank, *supra* note 4, at 859.

139. 2001 Joint Memorandum, *supra* note 137, at 2; *see* Mank, *supra* note 4, at 859.

140. 2001 Joint Memorandum, *supra* note 137, at 3; Mank, *supra* note 4, at 859.

141. Mank, *supra* note 4, at 859.

142. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1991-92 (Jan. 15, 2003) [hereinafter ANPRM]; Mank, *supra* note 4, at 879-80.

143. ANPRM, *supra* note 142, at 1995-98; *see* Mank, *supra* note 4, at 880-83.

144. ANPRM, *supra* note 142, at 1997-98; *see* Mank, *supra* note 4, at 881-83.

that they 'should continue to assert jurisdiction over traditional navigable waters . . . and, generally speaking, their tributary systems (and adjacent wetlands).'"[145] Additionally, "because *SWANCC* did not overrule *Riverside Bayview*, the Corps continued to assert jurisdiction over waters "'neighboring'" traditional navigable waters and their tributaries."[146]

After receiving over 30,000 comments, the agencies subsequently extended the comment period to April 16, 2003.[147] In December 2003, the Agencies announced that they would not issue new regulations significantly restricting their jurisdiction over wetlands, but instead would keep the January 2003 joint guidance in effect until issuing revised guidance defining the Act's jurisdiction.[148] According to Justice Stevens, "almost all of the 43 States to submit comments opposed any significant narrowing of the Corps' jurisdiction—as did roughly 99% of the 133,000 other comment submitters."[149] Some commentators have speculated that the Agencies may have decided not to issue regulations because there were strongly conflicting views between developers and conservationists, including hunters and fishers, about the scope of the Act's jurisdiction.[150]

II. *RAPANOS*

The fundamental underlying difference among the three main opinions in *Rapanos* was between the textualist method of statutory interpretation used by Justice Scalia and the purposivist approaches of Justices Kennedy and Stevens.[151] Justice Scalia's plurality opinion focused on the meaning of the statute's text in light of the common meaning of words in a dictionary.[152] He peremptorily assumed that he could find the Act's meaning by simply using a dictionary and dismissed the possibility that the text was ambiguous enough to justify the Corps' interpretation.[153]

Justices Kennedy and Stevens focused on the Act's underlying purposes,

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145. *Rapanos*, 126 S. Ct. at 2217 (2006) (quoting ANPRM, *supra* note 142, at 1998).

146. *Rapanos*, 126 S. Ct. at 2217 (quoting ANPRM, *supra* note 142, at 1997 (citation omitted)).

147. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 9613, 9613 (Feb. 28, 2003); Ray A. Smith, New Guidelines Stir Debate on Wetlands, WALL ST. J., Feb. 26, 2003, at B8 (reporting agencies received over 30,000 comments regarding ANPRM).

148. Press Release, EPA, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003), *at* http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/540f28acf38d7f9b85256dfe00714ab0?OpenDocument; Mank, *supra* note 4, at 883.

149. United States v. Rapanos, 126 S. Ct. 2208, 2256 n.4 (2006) (Stevens, J., dissenting).

150. Matt Shipman, *Old Dispute Hampers New Administration Bid to Settle Water Act Scope*, INSIDE THE EPA, June 23, 2006, *available at* 2006 WL 10765163.

151. Dorf, *supra* note 20.

152. *See infra* notes 164-67, 364 and accompanying text.

153. *See infra* notes 164-70 and accompanying text.

agreed that the plurality's interpretation was flawed, but the two Justices disagreed as to what extent the statute was ambiguous and the amount of deference due to the Corps.[154] In light of the Act's broad purposes and Congress' intent to give the Corps wide discretion to achieve those purposes, Justice Stevens's dissenting opinion argued that the Corps' wetlands regulations were justified in claiming jurisdiction over all tributary wetlands.[155] By contrast, Justice Kennedy argued that the Act's use of the term "navigable waters" limited its jurisdictional scope to waters having a "significant nexus" to navigable waters and that the Corps regulations were deficient because they did not demonstrate the existence of such a nexus for all the wetlands that it regulated.[156] His broad interpretation of the term "significant nexus" in light of the Act's broad ecological purposes, however, raises a significant possibility that the Corps could justify most of its existing regulation of tributary wetlands.[157] Justice Kennedy's overall approach was closer to Justice Stevens's dissenting opinion because they both focused on the statute's purposes more than its ambiguous text, although there are clearly some important differences between the two opinions.

A. Justice Scalia's Plurality Opinion

Justice Scalia announced the judgment of the Court, but lower courts will more likely follow Justice Kennedy's opinion rather than the plurality opinion.[158] At the beginning of the opinion, the plurality criticized "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute," described the Corps as an "enlightened despot," deplored the delays and expense of the permit process, and observed that "Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines."[159] Justice Scalia complained that the Corps' expansive definition gave it jurisdiction over almost any significant land area that contained an intermittent conduit, stating, "[b]ecause they include the land containing storm sewers and desert washes, the statutory 'waters of the United States' engulf entire cities and immense arid wastelands."[160] A cynical observer would argue that the plurality's distaste for the results of the Corps' policies could have easily influenced their narrow interpretation of the Act's language.

Although rejecting the *Rapanos* petitioners' argument that the terms "navigable waters" and "waters of the United States" in the Act are "limited to the traditional definition of [navigability in] *The Daniel Ball*," Justice Scalia

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154. *See infra* notes 264-69, 387-88 and accompanying text.

155. United States v. Rapanos, 126 S. Ct. 2208, 2252 (2006) (Stevens, J., dissenting); *see also infra* notes 214-24 and accompanying text.

156. *Rapanos*, 126 S. Ct. at 2236; *see also infra* notes 263-76 and accompanying text.

157. *See infra* notes 217-20, 329-31, 360, 488 and accompanying text.

158. *Rapanos*, 126 S. Ct. at 2265 & n.14 (2006) (Stevens, J., dissenting).

159. *Id.* at 2214-15 (Scalia, J., plurality opinion).

160. *Id.* at 2215.

observed that the *SWANCC* Court made clear that the "qualifier 'navigable' is not devoid of significance."[161] He maintained that the Court did not need to "decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act" because "[w]hatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over 'waters.'"[162] Justice Scalia reasoned that the "Corps' expansive approach might be arguable if the CSA [sic] defined 'navigable waters' as 'water of the United States.'"[163]

Justice Scalia focused on the meaning of the statute's text in light of the common meaning of words in dictionaries. He argued that the Act's "use of the definite article ('the') and the plural number ('waters') show plainly that § 1362(7) does not refer to water in general."[164] Instead, relying on and quoting the 1954 second edition of Webster's New International Dictionary ("Webster's Second"), he maintained that "'the waters' refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'"[165]

Additionally, Justice Scalia observed that the Webster's Second definition "refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'"[166] He reasoned that "[a]ll of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[167] Justice Scalia conceded that the term might include rivers that "dry up in extraordinary circumstances, such as drought" or seasonal rivers.[168] He rejected Justice Kennedy's observation that Webster's Second includes an alternative definition of waters because it was "wholly unreasonable to interpret the statute as regulating only 'floods' and 'inundations' rather than traditional waterways."[169] Implicitly, Justice Scalia rejected the possibility that waters could include both permanent waterways and intermittent streams caused by rainfall or flooding.

Justice Scalia recognized that his interpretation of the Act's jurisdiction to include only relatively permanent, standing or continuously flowing bodies of water would exclude many channels that the Corps has regulated for over thirty years. Under his interpretation of the statute, the Corps had over-regulated far too many areas that are essentially dry land. Justice Scalia asserted, "[i]n applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and

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161. *Id.* at 2220.

162. *Id.* (quoting 33 U.S.C. § 1362(7) (2000)).

163. *Id.*

164. *Id.*

165. *Id.* at 2220-21 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

166. *Id.* at 2221 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 165, at 2882).

167. *Id.*

168. *Id.* at 2221 n.5.

169. *Id.* at 2221 n.4.

culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody."[170]

Additionally, Justice Scalia reasoned that "the Act's use of the traditional phrase 'navigable waters' . . . further confirms that it confers jurisdiction only over relatively *permanent* bodies of water."[171] He observed that traditionally the term "navigable waters" was understood to include "only discrete *bodies* of water," and that *SWANCC* recognized that the term "carries *some* of its original substance."[172] Justice Scalia also noted that the *Riverside Bayview* Court had described "the waters of the United States" as "referr[ing] primarily to 'rivers, streams, and other *hydrographic features*,'" all of which in his view referred to permanent bodies of water.[173]

Furthermore, Justice Scalia argued "the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'"[174] He observed that the definition of point source includes, but is not limited to, "any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged."[175] He claimed that it made more sense to treat "'point sources'" and "'navigable waters'" as separate and distinct categories because the "definition of 'discharge' would make little sense if the two categories were significantly overlapping."[176] Justice Scalia reasoned that the "separate classification of 'ditch[es], channel[s], and conduit[s]'—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* 'waters of the United States.'"[177]

Next, Justice Scalia argued that only his narrow interpretation of the term "'waters' is consistent with CWA's stated 'policy . . . to recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources.'" [178] Thus, he reasoned that "[e]ven if the phrase 'the waters of the United States' were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible."[179] Justice Scalia observed that *SWANCC* had rejected the Corps broad interpretation of its jurisdiction, in part, because the term "the waters of the United States" did not

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170. *Id.* at 2222.

171. *Id.*

172. *Id.*

173. *Id.* (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 131 (1985)) (emphasis added by Justice Scalia).

174. *Id.* (quoting 33 U.S.C. § 1362(14) (2000)).

175. *Id.* (quoting 33 U.S.C. § 1362(14) (2000)).

176. *Id.* at 2223.

177. *Id.* (emphasis in original).

178. *Id.* (quoting 33 U.S.C. § 1251(b) (2000)).

179. *Id.* at 2224; *see* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (deferring to agency interpretation of a statute only if the interpretation is permissible).

support the Corps' "unprecedented intrusion into traditional state authority" or authorize federal action that "stretches the outer limits of Congress's commerce power" without far more explicit statutory authorization from Congress.[180] He concluded that "on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water.... The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[181] One must question Justice Scalia's assurance that his is the only plausible interpretation when five other justices disagreed and most lower court decisions had interpreted the Act more broadly.[182]

Justice Scalia concluded that it is "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between the 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[183] This continuous surface connection requirement invalidates the approach used by many lower courts and the Corps on numerous occasions to allow regulation of wetlands that have a hydrological or ecological connection to navigable waters. Justice Scalia observed that the Sixth Circuit in *Rapanos* had "stated that, even if the ditches were not 'waters of the United States,' the wetlands were 'adjacent' to *remote* traditional navigable waters in virtue of the wetlands' 'hydrological connection' to them."[184] He noted that many Corps' district offices had adopted the hydrological connection approach.[185] Justice Scalia argued that a wetland may not be considered "adjacent to" remote "waters of the United States" based on a mere hydrologic connection.[186] He characterized the *Riverside Bayview* Court's deference to the Corps inclusion of adjacent wetlands as "waters of the United States" as justified by the inherent ambiguity in defining the boundaries where the "water" ends and its abutting or "adjacent" wetlands begin.[187] Justice Scalia maintained that the *Riverside Bayview* Court allowed the Corps to rely on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters.[188] He contended that his interpretation of *Riverside Bayview* was supported by the fact that the *SWANCC* Court did not allow the Corps to consider ecological factors in determining their jurisdiction over isolated waters because there was no boundary-drawing problem justifying the

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180. *Id.* (citing Solid Waste Agency of N. Cook County (SWANCC) v. Army Corps of Eng'rs, 531 U.S. 159 (2001)).

181. *Id.* at 2225.

182. *See infra* notes 206-08, 247-50, 417 and accompanying text.

183. *Rapanos*, 126 S. Ct. at 2226 (emphasis in original).

184. *Id.* at 2225 (quoting United States v. Rapanos, 376 F.3d 629, 639-40 (6th Cir. 2004), *vacated and remanded*; 126 S. Ct. 2208 (2006)) (emphasis added by Justice Scalia).

185. *Id.*

186. *Id.* at 2225-27.

187. *Id.* at 2225-26.

188. *Id.*

invocation of those factors.[189]

Although not an issue before the Court, Justice Scalia rejected the argument of the government and many amici that restricting the definition of navigable waters would "frustrate enforcement against traditional water polluters" by allowing them to pollute intermittent streams that would no longer be within the Act's jurisdiction under the plurality opinion.[190] Although under his interpretation of the Act intermittent streams or channels would no longer be navigable waters, he maintained that such channels would still be point sources under Section 402 of the Act, and therefore, polluters who dumped into non-navigable channels would still be liable if any pollution flowed downstream into navigable waters. [191] Justice Scalia acknowledged that the issue of point source pollution was not before the Court, but he felt compelled to address the issue because he needed to respond to the assertion that his narrow definition of "waters of the United States" must be wrong if it effectively gutted enforcement against water polluters. He suggested in dicta that the hydrological connection approach used by the Sixth Circuit might well be appropriate in determining the responsibility of point sources for downstream pollution into waters of the United States, but maintained that the hydrological connection approach was not appropriate to the different problem of placing immobile fill into wetlands under separate § 404 wetlands program.[192]

Because the Sixth Circuit applied an incorrect standard to determine whether the wetlands at issue are covered "waters," and because of the "paucity of the record," the plurality, joined by Justice Kennedy's fifth vote, vacated the judgments of the Sixth Circuit and remanded the cases for further proceedings.[193] According to the plurality opinion, the lower courts on remand could find in favor of the Corps having jurisdiction over the *Rapanos* and *Carabell* sites only by finding that the adjacent channel contains a relatively permanent "water of the United States," and that each wetland "has a continuous surface connection with that water, making it difficult to determine where the water ends and the 'wetland' begins."[194] The Corps would likely lose both cases under this two-part test.

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189. *Id.* at 2226.

190. *Id.* at 2227.

191. *Id.* (discussing CWA § 301, 33 U.S.C. § 1311(a) (2000) (prohibiting discharge of any pollutant except in compliance with other provisions of Act); CWA § 402, 33 U.S.C. § 1342 (2000) (requiring permit before anyone may discharge pollutant from point source into navigable waters); CWA § 502, 33 U.S.C. § 1362(12)(A) (2000) (defining the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source")).

192. *Id.* at 2228 (contrasting CWA § 404, 33 U.S.C. § 1344 (2000) (requiring permit before anyone may place fill into wetlands) with CWA § 402, 33 U.S.C. § 1342 (2000) (requiring permit before anyone may discharge pollutant from point source into navigable waters).

193. *Id.* at 2235.

194. *Id.* at 2227, 2235.

B. Justice Stevens's Dissenting Opinion

Next, it will be helpful to consider Justice Stevens's dissenting opinion to better understand whether Justice Kennedy's opinion concurring in the judgment is closer to the plurality opinion or the dissenting opinion. Justice Stevens argued that Justice Kennedy, and especially the plurality opinion, failed to give sufficient deference to the Corps' interpretation of a complex regulatory statute that Congress had delegated to the Corps to administer and ignored that Congress had implicitly acquiesced in that interpretation.[195] Justice Stevens contended that the Court should defer to the Corps' "reasonable interpretation" that protecting wetlands adjacent to tributaries of navigable waters enhance the ecology and hydrology of "waters of the United States."[196]

1. Justice Stevens Strongly Disagrees with the Plurality Opinion.—Justice Stevens argued that *Riverside Bayview* controlled the decision in *Rapanos* even though the wetlands in the former case were adjacent to actual navigable waters and the ones in the present cases were not.[197] He stated, "Our unanimous opinion in *Riverside Bayview* squarely controls these cases."[198] Justice Stevens explained,

> [a]lthough the particular wetland at issue in *Riverside Bayview* abutted a navigable creek, we framed the question presented as whether the Clean Water Act "authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water *and their tributaries*."[199]

Not surprisingly, Justice Scalia explicitly disagreed and concluded that *Riverside Bayview* could not control the different facts at issue in the two Sixth Circuit cases before the Court.[200] Justice Stevens, conversely, rejected "the plurality's revisionist reading" of *Riverside Bayview* "that 'adjacent' means having a 'continuous surface connection' between the wetland and its neighboring creek" when that Court had actually defined adjacent as "wetlands that form the border of or are in reasonable proximity to other waters."[201]

Justice Stevens argued that the plurality's heavy reliance on *SWANCC* was misplaced because that case was about isolated waters and "had nothing to say about wetlands, let alone about wetlands adjacent to traditionally navigable waters or their tributaries."[202] Instead, he argued that *Riverside Bayview* should control because wetlands adjacent to tributaries play the same ecological role as

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195. *Id.* at 2252-53 (Stevens, J., dissenting).

196. *Id.* at 2253.

197. *Id.* at 2255.

198. *Id.*

199. *Id.* (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 123 (1985)) (emphasis added by Justice Stevens).

200. *Id.* at 2229-30 (Scalia, J., plurality opinion)

201. *Id.* at 2255 (Stevens, J., dissenting) (quoting *Riverside Bayview*, 474 U.S. at 134).

202. *Id.* at 2256.

the adjacent wetlands at issue in that case, and the term "waters of the United States" is an ambiguous phrase that the Corps may reasonably construe to include all non-isolated wetlands, including those adjacent to tributaries.[203] Furthermore, the dissenters argued that *Riverside Bayview* allowed the Corps to regulate all adjacent wetlands because most serve important ecological values and have a significant nexus to navigable waters without imposing a requirement that the courts and the Corps conduct a case-by-case examination of these connections in every single case, which the plurality and Justice Kennedy would require.[204] Justice Stevens contended that the plurality had exaggerated the costs of wetlands regulation, ignored the benefits of such regulation, and, most importantly, that it was inappropriate for the judiciary to engage in policy balancing that is the role of Congress and the Corps.[205]

Justice Stevens sharply disagreed with the plurality's requirement that jurisdictional waters must be "relatively permanent" because even the dictionary definition in Webster's Second that they relied upon which defines "streams" as "waters" does not address whether streams must be continuous or may be intermittent, such as a 290-day stream.[206] He argued that "common sense and common usage demonstrate that intermittent streams, like perennial streams, are still streams."[207] Additionally, the dissent contended that the plurality's attempted distinction between permanent waters and intermittent point sources is flawed since "all hold water permanently as well as intermittently."[208]

Furthermore, Justice Stevens responded that the Act's general policy that states retain primary responsibility for preventing water pollution does not justify the plurality's claim that protecting states' rights requires a narrow construction of the term "waters of the United States" to exclude intermittent waters.[209] Under the Commerce Clause, he argued that Congress may regulate any intermittent waters to prevent pollution or protect against floods in navigable waters.[210] Also, Justice Stevens asserted that the plurality's "separate requirement that 'the wetland has a continuous surface connection' with its abutting waterway" ignores the impact that neighboring waters without such an explicit connection may have on navigable waters.[211] Moreover, he maintained that the plurality's distinction between limited federal regulation of allegedly immobile fill in wetlands and greater federal regulation of mobile pollutants from point sources was flawed because silt from wetland fill could be carried downstream and thus bring pollution downstream.[212] Furthermore, Justice Stevens also contended that

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203. *Id.* at 2257.
204. *Id.* at 2258.
205. *Id.* at 2258-59.
206. *Id.* at 2259-60.
207. *Id.* at 2260.
208. *Id.* at 2260-61.
209. *Id.* at 2261 (citing 33 U.S.C. § 1251(b) (2000)).
210. *Id.* at 2261-62.
211. *Id.* at 2262-63.
212. *Id.* at 2263.

there was justification for federal regulation of immobile fill because excessive sediment can harm invertebrates and fish spawning.[213]

2. *Justice Stevens Disagrees with Justice Kennedy's "Significant Nexus" Test.*—Although he "generally agree[d] with Parts I and II-A" of Justice Kennedy's opinion, which summarized the Act's history and disagreed with the plurality opinion in most respects, Justice Stevens disagreed with Justice Kennedy's "view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*."[214] Even if the "significant nexus" test should be the standard, Justice Stevens argued that test "is categorically satisfied as to wetlands adjacent to navigable waters or their tributaries."[215] He contended that the "significant nexus" test was satisfied in *Rapanos* and *Carabell* because the tributary wetlands in those two cases were essentially similar to the adjacent wetlands at issue in *Riverside Bayview*.[216]

Justice Stevens argued that "wetlands adjacent to tributaries of navigable waters generally have a 'significant nexus' with the traditionally navigable waters downstream."[217] Unlike the isolated waters at issue in *SWANCC*, he maintained that:

> these wetlands can obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the "limited" connection to traditionally navigable waters that is all the statute requires. . . .[218]

Additionally, Justice Stevens asserted, tributary wetlands "can preserve downstream water quality by trapping sediment that filtering toxic pollutants, protecting fish-spawning grounds, and so forth."[219] Although conceding that a few wetlands adjacent to tributaries may not have a significant nexus, he contended that the vast majority will meet that test and as a result the "test will probably not do much to diminish the number of wetlands covered by the Act in the long run."[220] Justice Stevens complained that Justice Kennedy's "approach will have the effect of creating additional work for all concerned parties," including developers and the Corps.[221] Justice Stevens argued that *Riverside Bayview*'s "deferential approach avoided" the largely unnecessary work imposed by the "significant nexus" test.[222] Disagreeing with Justice Kennedy, Justice

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213. *Id.* at 2263-64.
214. *Id.* at 2264.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 2264-65.
222. *Id.* at 2265.

Stevens saw "no reason to change *Riverside Bayview*'s approach—and every reason to continue to defer to the Executive's sensible, bright-line rule."[223]

3. Justice Stevens's Conclusion.—Justice Stevens concluded:

> By curtailing the Corps' jurisdiction of more than 30 years, the plurality needlessly jeopardizes the quality of our waters. In doing so, the plurality disregards the deference it owes the Executive, the congressional acquiescence in the Executive's position that we recognized in *Riverside Bayview*, and its own obligation to interpret laws rather than to make them. While Justice KENNEDY's approach has far fewer faults, nonetheless it also fails to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act.[224]

The dissenters would have affirmed the judgments in both cases, thus disagreeing with the decision of five members of the Court to vacate and remand.[225] Justice Stevens observed that the case was unusual because the plurality and Justice Kennedy proposed different tests to be applied on remand and therefore Justice Stevens suggested how the lower courts should reconcile those differences.[226] "Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice KENNEDY's test is satisfied," Justice Stevens declared that "on remand each of the judgments should be reinstated if *either* of those tests is met."[227] The DOJ has explicitly endorsed his approach in its motion for remand in the *Rapanos* case now before the Sixth Circuit.[228] Justice Stevens further explained that Justice Kennedy's test would apply in most circumstances, but that it was possible in a few cases that the plurality opinion would be broader and thus operative.[229] "I assume that Justice KENNEDY's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but Justice KENNEDY's is not, courts should also uphold the Corps' jurisdiction."[230] As is discussed below, Justice Stevens's assertion about there being a working majority whenever either the plurality or Justice Kennedy's test is satisfied is also arguably supported by the Court's subsequent *League of United Latin American Citizens* decision, which was decided the week after *Rapanos* and involved different working majorities on different issues.[231]

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223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *See infra* notes 441-42 and accompanying text.
229. *Rapanos*, 126 S. Ct. at 2265 n.14.
230. *Id.*
231. *See infra* notes 468-71 and accompanying text.

C. Justice Kennedy's Crucial Opinion

1. The Significant Nexus Test is the Key to the Act's Jurisdiction.—At the beginning of his opinion, Justice Kennedy stated that *SWANCC* had held that the term "navigable waters" under the Act is defined by whether a water or wetland "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[232] Explaining his decision to write a solo opinion, he observed that neither the plurality opinion nor the dissenting opinion "chooses to apply this test[.]"[233] Justice Kennedy explained that the Sixth Circuit in the two cases below had applied the "significant nexus" test, but "it did not consider all the factors necessary to determine whether the lands in question had, or did not have, the requisite nexus. In my view the cases ought to be remanded to the Court of Appeals for proper consideration of the nexus requirement."[234] His introductory paragraph announces that the "significant nexus" test is the crucial standard for lower courts to consider in determining whether wetlands that are not adjacent to navigable waters have the "requisite nexus" to navigable or potentially navigable waters.[235]

Justice Kennedy took a much more positive view of the Corps regulations defining the Act's jurisdiction than the plurality. He wrote, "Contrary to the plurality's description wetlands are not simply moist patches of earth."[236] Justice Kennedy explained that the Corps regulations and its lengthy Wetlands Delineation Manual carefully define wetlands by requiring the presence of the following factors:

> (1) prevalence of plant species typically adapted to saturated soil conditions; . . . (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years.[237]

Under the Corps regulations, wetlands that meet these criteria and are adjacent to tributaries of navigable waters are within the Act's jurisdiction, "even if they are 'separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.'"[238]

In reviewing the facts of the two cases, especially *Rapanos*, Justice Kennedy emphasized the facts favorable to the government. The District Court in *Rapanos*

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232. *Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring) (quoting Solid Waste Agency of N. Cook County (SWANCC) v. Army Corps of Eng'rs, 531 U.S. 159, 167, 172 (2001)).

233. *Id.* at 2236; *see also id.* at 2241.

234. *Id.* at 2236.

235. *Id.*

236. *Id.* at 2237 (citation omitted).

237. *Id.* at 2237-38.

238. *Id.* at 2238 (quoting 33 C.F.R. § 328.3(c) (2005)).

had found surface water connections between wetlands on all three parcels of Rapanos' land and navigable waters or tributaries that flow into such waters.[239] In *Carabell*, a berm currently prevented surface-water flow from the wetlands at issue into a ditch that eventually flowed in navigable waters, but there was some evidence that water might flow in the future if the Carabells were allowed to fill the disputed wetlands.[240]

In discussing the seminal *Riverside Bayview* and *SWANCC* decisions, Justice Kennedy reasoned that the key issue underlying both decisions was whether a significant nexus existed between the wetlands at issue and navigable or potentially navigable waters.[241] He observed that the *Riverside Bayview* Court had held that "'the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act,'" although the Court only addressed wetlands adjacent to navigable waters.[242] In *SWANCC*, the Court interpreted *Riverside Bayview* as resting on an implied significant nexus test and held that isolated waters lacked such a nexus.[243] For Justice Kennedy, "[a]bsent a significant nexus, jurisdiction under the Act is lacking."[244] Accordingly, "[b]ecause neither the plurality nor the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is necessary."[245]

2. Rejecting the Plurality Opinion.—Justice Kennedy disagreed with the plurality opinion's two-part test and most of its reasoning.[246] He rejected the plurality's first requirement of either "permanently standing water or continuous flow" because intermittent waters, especially in the western United States, frequently have far more significant impacts than most continuously flowing small streams.[247] Although Congress in theory could have excluded intermittent waters despite their importance, Justice Kennedy observed that the definition of waters in Webster's Second includes "flood or inundation," which he reasoned would indicate that Congress meant to include intermittent waters as waters of the United States.[248] Additionally, the plurality's contention that *Riverside Bayview*'s use of the term "hydrographic feature[]" limits the definition of waters to permanent waters is flawed because the phrase could easily apply to

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239. *Id.*

240. *Id.* at 2239-40.

241. *Id.* at 2240-41.

242. *Id.* at 2240 (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985)).

243. *Id.* at 2241 (citing Solid Waste Agency of N. Cook County (SWANCC) v. Army Corps of Eng'rs, 531 U.S. 159, 167, 172 (2001)).

244. *Id.* at 2241.

245. *Id.*

246. *Id.* at 2241-47.

247. *Id.* at 2242.

248. *Id.* at 2242-43 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 165, at 2882).

"intermittent streams carrying substantial flow to navigable waters."[249] Furthermore, the plurality's argument that the Act makes a clear distinction between permanent waters of the United States and intermittent point sources is wrong Justice Kennedy asserted because either waters or point sources can be permanent or intermittent.[250]

Moreover, Justice Kennedy responded that the "plurality's second limitation—exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters—is also unpersuasive."[251] He rejected the plurality's interpretation of *Riverside Bayview* as including only wetlands that "are '*indistinguishable*' from waters to which they bear a surface connection."[252] Although the plurality may be correct that *Riverside Bayview* included adjacent wetlands as waters of the U.S. in part because of the difficulty in drawing the line between open waters and wetlands, Justice Kennedy responded that the *Riverside Bayview* decision had rejected the requirement that water must flow between wetlands and navigable waters.[253] Instead it had allowed their regulation because it was reasonable "'for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem.'"[254] Furthermore, *Riverside Bayview* presumed that wetlands created by flooding as opposed to continuous surface flow may be regulated as adjacent wetlands.[255] Also, adjacent wetlands may protect water quality by filtering substances that would otherwise harm navigable waters even if there is not a direct surface connection.[256]

Justice Kennedy concluded, "[i]n sum the plurality's opinion is inconsistent with the Act's text, structure, and purpose."[257] He criticized "the plurality's overall tone and approach" for being "unduly dismissive" of the public interest in protecting wetlands and aquatic quality.[258] Justice Kennedy argued that "[t]he limits the plurality would impose, moreover, give insufficient deference to Congress' purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate."[259]

Finally, Justice Kennedy disagreed with Chief Justice Roberts's concurring opinion, which argued that the Corps should have issued revised regulations in the wake of *SWANCC*.[260] Justice Kennedy observed that "because the plurality presents its interpretation of the Act as the only permissible reading of the plain

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249. *Id.* at 2243.
250. *Id.*
251. *Id.* at 2244.
252. *Id.* at 2234, 2244 (emphasis supplied by Justice Kennedy).
253. *Id.* (Kennedy, J., concurring).
254. *Id.* (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 135 n.9 (1985)).
255. *Id.*
256. *Id.* at 2245-46.
257. *Id.* at 2246.
258. *Id.* at 2246-47.
259. *Id.* at 2247.
260. *Id.*; *see also id.* at 2235-36 (Roberts, C.J., concurring).

text . . . the Corps would lack discretion, under the plurality's theory, to adopt contrary regulations."[261] He responded, "[n]ew rulemaking could have averted the disagreement here only if the Corps had anticipated the unprecedented reading of the Act that the plurality advances."[262]

3. Disagreeing with the Dissenting Opinion.—Justice Kennedy had some significant disagreements with the dissenting opinion, but he agreed with it more than he did with the plurality opinion. He stated, "[w]hile the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance."[263] Justice Kennedy rejected the dissenting opinion's interpretation that the term "navigable waters" was so ambiguous that the Corps was entitled to regulate any non-isolated waters.[264] He claimed, "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."[265] Although the Act is not limited to only navigable in fact waters, Justice Kennedy observed that *SWANCC* had stated that "the word 'navigable' in the Act must be given some effect."[266]

Rejecting the dissenting opinion's complete deference to the Corps regulations, Justice Kennedy stated, "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[267] He accepted the Corps' general rationale in its 1977 regulations for regulating wetlands "that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage."[268] Justice Kennedy demanded, however, that the Corps demonstrate a specific ecological nexus between the wetlands it seeks to regulate and navigable waters. He explained,

> wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term navigable

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261. *Id.* at 2247; *see also id.* at 2225-27 (Scalia, J., plurality opinion).

262. *Id.* at 2247 (Kennedy, J., concurring).

263. *Id.*

264. *Id.* at 2248.

265. *Id.* at 2247.

266. *Id.* (citing Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001)).

267. *Id.* at 2248.

268. *Id.* (citing 33 C.F.R. § 320.4(b)(2) (2005)).

waters.[269]

4. Calling on the Corps to Issue Regulations Defining What is a Significant Nexus.—Justice Kennedy strongly encouraged the Corps to issue new regulations defining when tributary wetlands have a significant nexus with navigable waters.[270] He first observed that the Corps' current test for wetlands adjacent to traditional navigable waters is reasonable because for such wetlands a "reasonable inference of ecological interconnection" can be drawn as recognized in *Riverside Bayview*.[271] For the tributary wetlands at issue in the current two cases, however, Justice Kennedy contended that one could not presume such a close connection to navigable waters.[272] First, the Corps' definition of tributary includes any water that "feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,' [33 C.F.R.] § 328.3(e)."[273] Although this definition had some merit if the Corps applied it consistently, he contended that the Corps' broad definition of tributary "seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it" and that this definition "precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[274] Because wetlands adjacent to tributaries do not always have a significant nexus with navigable waters, Justice Kennedy argued that the Corps needed to define which categories of tributary wetlands have significant ecological nexus with navigable waters by either issuing new regulations or deciding the issue through case-by-case adjudications.[275]

To encourage the Corps to issue new regulations addressing his significant nexus test, Justice Kennedy suggested relevant factors the Corps could evaluate to

> identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.[276]

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269. *Id.*

270. *Id.* at 2248-49.

271. *Id.* at 2248.

272. *Id.* at 2249.

273. *Id.* at 2237, 2248-49; *see generally* Virginia Albrecht & Deidre Duncan, *Justice Kennedy's Concurring Opinion in* Rapanos *Suggests Need for Rulemaking*, 37 ENV'T REP. (BNA) 1647 (2006).

274. *Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring).

275. *Id.*

276. *Id.* at 2248.

Until the Corps issued such regulations, he observed that the Corps, developers, and lower courts would have to address whether there is a significant nexus between tributary wetlands and navigable waters on a case-by-case basis.[277] Justice Kennedy also suggested, "[w]here an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region," but he acknowledged that this idea was dicta because "[t]hat issue, however, is neither raised by these facts nor addressed by any agency regulation that accommodates the nexus requirement outlined here."[278]

Justice Kennedy obliquely rejected a quasi-constitutional argument raised by the plurality against a broad interpretation of the Corps' authority. The plurality opinion, without directly endorsing the constitutional challenge by the petitioners, stated that the Corps' interpretation of its authority over wetlands "stretches the outer limits of Congress's commerce power."[279] Justice Kennedy, however, stated that wetlands as defined by his significant nexus test "raise no serious constitutional or federalism difficulty."[280] He explained that application of the significant nexus test would "prevent[] problematic applications of the statute."[281] Furthermore, Justice Kennedy argued that if his test allowed a few examples of federal regulation that arguably intruded on legitimate state sovereignty, these isolated instances were of no importance as part of a comprehensive statutory scheme that legitimately regulates commerce.[282] He cited the Court's 2005 decision in *Gonzales v. Raich*[283] in which the Court held that Congress may prohibit states from legalizing medical marijuana even if most of the medical marijuana does not enter interstate commerce because the challenged statute serves the comprehensive purpose of regulating interstate commerce in marijuana and the fact that the statute may intrude on some purely intrastate commerce does not undermine its overall validity. Thus, Justice Kennedy argued that his test was constitutional pursuant to the Court's comprehensive doctrine even if his test might intrude on state sovereignty.

5. Suggesting the Government Would Likely Win on Remand.—Justice Kennedy stated that it was necessary to remand the two cases because the lower courts had not fully applied the significant nexus test he had discussed in his opinion in determining whether the government had proven a sufficient connection between the wetlands on Rapanos's and Carabell's properties and navigable waters.[284] He suggested that there may be sufficient evidence of such a nexus for the government to win both cases and that the end result on remand

277. *Id.* at 2249.
278. *Id.*
279. *Id.* at 2224 (Scalia, J., plurality opinion).
280. *Id.* at 2249 (Kennedy, J., concurring).
281. *Id.* at 2250.
282. *Id.*
283. 545 U.S. 1 (2005).
284. *Rapanos*, 126 S. Ct. at 2250 (Kennedy, J., concurring).

would likely be closer to the dissenting opinion.[285] Justice Kennedy stated that the "record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above. Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps's assertion of jurisdiction is valid."[286]

Justice Kennedy examined the specific factual conclusions and legal standards used in the two cases below. In *Rapanos*, he observed that the "District Court found that each of the wetlands bore surface water connections to tributaries of navigable-in-fact waters," but he faulted the Sixth Circuit for applying a "mere hydrological connection" test that did not assess how significant the nexus was between the wetlands and navigable waters.[287] In *Carabell*, Justice Kennedy suggested that the record contained evidence by the Corps that filling the wetlands could cause ecological harm, but he claimed that this evidence was too speculative to meet the substantial evidence required to justify the Corps claims.[288] Justice Kennedy further commented, "[a]s in *Rapanos,* though, the [*Carabell*] record gives little indication of the quantity and regularity of flow in the adjacent tributaries—a consideration that may be important in assessing the nexus. Also, as in *Rapanos,* the legal standard applied [in *Carabell*] to the facts was imprecise."[289] He also observed that the Sixth Circuit in *Carabell* had stated that a hydrological connection between the wetlands at issue and navigable waters was not necessary and expressed his view that "that much of its holding is correct. Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system."[290] Justice Kennedy reasoned, however, that the Court must remand the *Carabell* decision because the Corps had relied too much on the mere adjacency of the wetlands to a tributary without the necessary analysis of how significantly connected the wetlands are to navigable waters.[291] He concluded, "[i]n these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters."[292]

D. Chief Justice Roberts's Concurring Opinion

While joining the plurality opinion, Chief Justice Roberts also wrote a separate, solo concurring opinion. He first criticized the Corps and EPA for

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285. *Id.*
286. *Id.*
287. *Id.* at 2250-51.
288. *Id.* at 2251.
289. *Id.*
290. *Id.*
291. *Id.* at 2251-52.
292. *Id.* at 2252.

failing to issue new wetlands regulations in the wake of *SWANCC*, contrary to their promise to do so in the 2003 ANPRM.[293] Citing the *Chevron* doctrine of judicial deference to agency interpretations of ambiguous statutes, Roberts suggested that the Court would have given the Agencies "generous leeway" if they had narrowed their regulations in light of *SWANCC*.[294] He complained, "[r]ather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."[295] As Justice Kennedy observed, it is questionable whether the three other members of the plurality would have been as generous as Chief Justice Roberts suggests if the Corps had adopted new regulations that included intermittent waters or waters without a surface connection.[296]

If the Corps had adopted regulations that were narrower than its 1977 regulations but broader than the plurality's approach, it is an interesting, but unknowable question whether any members of the plurality opinion would have deferred to these hypothetical regulations. "Malcolm Stewart, the assistant U.S. solicitor general who wrote the government briefs for the two wetland cases defended the Corps" by arguing, "[i]t is more advantageous to do rulemaking now after the Supreme Court has issued more nuanced guidance on the subject."[297] Until Justice Kennedy's *Rapanos* opinion, the Agencies may have been unsure of the Court's approach to the Act's jurisdiction, so Chief Justice Roberts's criticism of their inaction is somewhat unfair.

Chief Justice Roberts was clearly unhappy that the Court failed to provide clear guidance to the lower courts on the scope of the Act, but he also implied that lower courts could find sufficient guidance in many cases by examining both the plurality opinion and Justice Kennedy's opinion. Roberts stated,

> It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. *See Grutter v. Bollinger*, 539 U.S. 306, 325 . . . (2003) (discussing *Marks v. United States*, 430 U.S. 188 . . . (1977)). What is unusual in this instance, perhaps, is how readily the situation could have been

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293. *Id.* at 2235-36 (Roberts, C.J., concurring).

294. *Id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984)). Justice Breyer's dissenting opinion also argued that courts should give *Chevron* deference to any regulations that the Corps wrote to implement the "significant nexus" test. *Id.* at 2266 (Breyer, J., dissenting).

295. *Id.* at 2235-36 (Roberts, C.J., concurring).

296. *Id.* at 2247 (Kennedy, J., concurring).

297. Amena H. Saiyid, *Corps of Engineers Urged to Write Rules to Clarify U.S. Jurisdiction Over Wetlands,* 37 ENV'T REP. (BNA) 1328 (2006).

avoided.[298]

Part IV.C will discuss the Department of Justice's dual approach to whether lower courts should follow the plurality or Justice Kennedy's concurring opinion, as well as scholarly disagreement about how lower courts should apply the *Marks* decision to the *Rapanos* opinions.[299]

E. Justice Breyer's Dissenting Opinion

Although he joined Justice Stevens's dissenting opinion, Justice Breyer also wrote a separate and solo dissent in which he urged the Corps to "speedily" write new regulations.[300] He argued that Congress wanted the Corps "to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review)" rather than have courts "make ad hoc determinations that run the risk of transforming scientific questions into matters of law."[301] Breyer also argued that courts should give *Chevron* deference to any regulations that the Corps wrote to implement the "significant nexus" test.[302]

F. Analysis of Rapanos

1. Not a Revolutionary Decision.—The *Rapanos* Court was one vote short of a major change in the Act's jurisdiction.[303] The plurality opinion would have drastically restricted the scope of the Act by limiting "waters of the United States" to permanent, standing or continuously flowing waters. By excluding most intermittent or ephemeral waters, the plurality would eliminate federal regulation of many rivers and streams, especially in the often dry western states.[304] Furthermore, this approach would have threatened federal regulation of many headwaters and canals even in generally wet Eastern and Midwestern states.[305] The plurality approach would have rejected the Corps' interpretation of the statute since 1975, which both Republican and Democratic administrations have accepted.[306] The plurality interpretation shows the dangers of a textualist approach that relies on a judge deciding which is the "best" dictionary definition from among many possibilities and arrogantly ignores the environmental expertise of the Corps and EPA over the last thirty years.[307] In light of the

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298. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

299. *See infra* Part IV.C.

300. *Rapanos*, 126 S. Ct. at 2266 (Breyer, J., dissenting).

301. *Id.*

302. *Id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

303. Howe Posting, *supra* note 24.

304. *Id.*

305. *Id.*

306. *Id*

307. Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1278-90 (1996) (arguing textualist statutory interpretation undervalues

multiple definitions of "waters," Justice Scalia should have been more willing to consider the possibility that the statute was ambiguous and that deference to the agencies that Congress delegated responsibility for enforcing the Act was appropriate.

The plurality also questioned the scope of congressional authority under the Commerce Clause, although it did not ultimately address that issue because it was not before the Court.[308] Justice Scalia did appropriately observe that a major purpose of the Act is to preserve a primary role for states in implementing its policies,[309] but he ignored the opposition of the 43 states to any significant narrowing of the current regulatory scheme.[310] He appears to take a formalist approach to what he thinks is the appropriate federalist division of responsibilities without looking at the empirical evidence of what most state governments actually want.

Justice Kennedy rejected the two central tests of the plurality opinion, first, the permanent, standing, or continuously flowing waters requirement; and, second, the surface water connection requirement.[311] Although he disagreed with all the other members of the Court for failing to adopt his significant nexus test, Justice Kennedy agreed far more with the dissenting opinion than with the plurality opinion.[312] For example, he explicitly agreed with the dissenting opinion that "waters" as defined in the Act includes intermittently flowing waters and explicitly disagreed with the plurality opinion's exclusion of impermanent waters.[313] Justice Kennedy also rejected the "plurality's second limitation—exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters."[314] He concludes, "In sum the plurality's opinion is inconsistent with the Act's text, structure, and purpose."[315] Justice Kennedy's rejection of the plurality opinion is far more complete than his criticism of the dissenting opinion. He explicitly acknowledges that in most cases, including the two cases below, his significant nexus test is likely to lead to the same result as would occur under the dissenting opinion's complete deference to the Corps'

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agency expertise in addressing complex environmental issues) [hereinafter Mank, *Textualist Approach*].

308. *See supra* note 279 and accompanying text.

309. United States v. Rapanos, 126 S. Ct. 2208, 2223-24 (2006) (Scalia, J., plurality opinion) (quoting 33 U.S.C. § 1251(b) (2000)).

310. *Id.* at 2256 n.4 (Stevens, J., dissenting).

311. *See supra* notes 247-56 and accompanying text.

312. Posting of Amy Howe to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2006/06/more_on_rapanos.html (June 19, 2006, 13:54 EST) (quoting William Buzbee); Posting of Amy Howe to SCOTUSBlog, http://www. scotusblog.com (June 19, 2006 13:30 EST) (quoting Richard Lazarus); *infra* notes 462-64 and accompanying text.

313. *Rapanos*, 126 S. Ct. at 2243 (Kennedy, J., concurring) ("[T]he dissent is correct to observe that an intermittent flow can constitute a stream" and "the plurality concludes . . . that navigable waters may not be intermittent. The conclusion is unsound.").

314. *Id.* at 2244-46.

315. *Id.* at 2246.

existing regulations.[316]

2. Is the Significant Nexus Test Appropriate?—Justice Kennedy was the only member of the Court to adopt the "significant nexus" test. It is important to understand why neither the plurality nor the dissenting opinion accepted that test. Both the plurality and dissenting opinions argued that *SWANCC*'s use of the term "significant nexus" was less significant than Justice Kennedy in understanding the scope of the Act, although for different reasons. Although his test is relatively vague, Justice Kennedy's significant nexus standard seeks to give meaning to an interpretation of the Act that is broader than traditional navigable waters, but still limits the Act's jurisdiction by requiring a significant connection between jurisdictional wetlands and navigable waters.

a. The plurality criticizes the "significant nexus" test.—The plurality sharply criticized the "significant nexus" test. The plurality argued that Justice Kennedy's "significant nexus" test was flawed because he expanded its meaning far beyond its use in *SWANCC* or what it could have meant in *Riverside Bayview*.[317] Justice Kennedy's "significant nexus" test requires the Corps to "establish . . . on a case-by-case basis" whether wetlands adjacent to non-navigable tributaries "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[318] By contrast, the plurality argued, *Riverside Bayview* had "explicitly rejected such case-by-case determinations of ecological significance for the *jurisdictional* question whether a wetland is covered, holding instead that *all* physically connected wetlands are covered."[319] Furthermore, *SWANCC*'s only example of a significant nexus was the abutting wetlands in *Riverside Bayview*.[320] Thus, the plurality reasoned that Justice Kennedy's approach,

> misreads *SWANCC's* "significant nexus" statement as mischaracterizing *Riverside Bayview* to adopt a case-by-case test of ecological significance; and then transfers that standard to a context that *Riverside Bayview* expressly declined to address (namely, wetlands nearby non-navigable tributaries); while all the time *conceding* that this standard does not apply in the context that *Riverside Bayview did* address (wetlands abutting navigable waterways).[321]

A weakness of the plurality's argument is that, while the *SWANCC* decision used *Riverside Bayview* as the only example of a "significant nexus,"[322] the Court's use of the term also suggested that a "significant nexus" between wetlands and

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316. *Id.* at 2250.

317. *Id.* at 2233 (Scalia, J., plurality opinion).

318. *Id.*; *see also id.* at 2248-49 (Kennedy, J., concurring).

319. *Id.* at 2233 (Scalia, J., plurality opinion) (emphasis in original).

320. *Id.*

321. *Id.*

322. Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167-68 (2001) ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.").

navigable waters is a fundamental test for whether wetlands are within the Act's jurisdiction, which is Justice Kennedy's interpretation of *SWANCC*.[323]

More importantly, the plurality argued that Justice Kennedy's opinion was fundamentally flawed because his test failed to address the meaning of the Act's text and structure.[324] The plurality argued that Justice Kennedy's "significant nexus" test placed far too much weight on a phrase that appears in only one sentence of one prior Court opinion and is found nowhere in the Act's text.[325] The plurality's argument that Justice Kennedy's opinion places far too much weight on the phrase "significant nexus" is shared by the dissenting opinion.[326] More controversial, is the plurality's argument that a "significant nexus" between waters and wetlands only exists if there is a "physical connection" between them so that they are "as a practical matter *indistinguishable* from waters of the United States."[327] The plurality dismissed Justice Kennedy's test that the Act includes wetlands that significantly affect navigable waters as the linguistic absurdity "that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?"[328]

The plurality charged that Justice Kennedy had re-written the statute by ignoring the statute's text and then tried to justify the "significant nexus" standard as serving the Act's ecological purposes, although at the same time ignoring the federalist policies in the statute.[329] The plurality argued that Justice Kennedy had essentially but wrongly set forth an interpretation which means that anything that "affects waters is waters."[330] Although Justice Kennedy claimed that his approach limited the authority of the Corps compared to the dissenting opinion's approach, the plurality feared that the "opaque" significant nexus test would in practice allow the Corps to regulate virtually everything it had under its current regulations.[331]

b. The dissenting opinion disagrees with the "significant nexus" test.—The dissenting opinion disagreed with making the "significant nexus" test the crucial jurisdictional test for the Act but for different reasons than the plurality. Justice Stevens argued,

> I do not share [Justice Kennedy's] view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term "significant nexus" as used in *SWANCC*. To the extent that our passing use of this term has become a statutory requirement, it is categorically satisfied as to wetlands

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323. *Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring)
324. *Id.* at 2234-35 (Scalia, J., plurality opinion).
325. *Id.* at 2234.
326. *See supra* notes 214-23 and accompanying text.
327. *Rapanos*, 126 S. Ct. at 2234 (Scalia, J., plurality opinion) (emphasis in original).
328. *Id.* (emphasis in original).
329. *Id.* at 2234-35.
330. *Id.* at 2235.
331. *Id.* at 2234 n.15.

adjacent to navigable waters or their tributaries.[332]

The dissenting opinion argued that the *Riverside Bayview* had addressed wetlands both adjacent to navigable waters and their tributaries and, thus, that only isolated waters like those in *SWANCC* were excluded.[333] Additionally, Justice Stevens maintained "it [is] clear that wetlands adjacent to tributaries of navigable waters generally have a 'significant nexus' with the traditionally navigable waters downstream[,]"[334] because of their ecological impacts.[335] Although the dissenting opinion disagreed with requiring the Corps to meet the "significant nexus" test, Justice Stevens optimistically predicted that the test would have little actual impact on restricting the Corps' authority, but would simply create a great deal of unnecessary work for the Corps without changing the ultimate result in most cases.[336]

c. Justice Kennedy's "significant nexus" test is consistent with precedent, but poses practical problems.—The extra work from the Corps that Justice Kennedy's approach would require makes sense only if one interprets the Act as broader than the plurality's physical connection approach, but narrower than the Corps' regulations or the dissenting opinion. Under an "intermediate" interpretation of the statute, the Corps cannot simply regulate any wet area in the United States, but only those that have a significant nexus with navigable waters, as *SWANCC* had suggested in a single sentence.[337] Because so many intermittent streams have important hydrological and ecological impacts, one must be skeptical that Justice Scalia's permanent flowing waters interpretation is the only reasonable interpretation of the Act, especially when inundation or flood is an alternative meaning of the word "waters."[338] Additionally, his second requirement that wetlands have a physical surface connection with navigable waters so that they are "indistinguishable" from those waters again contradicts the scientific reality that many long recognized wetlands are mostly land-like, are frequently filters for navigable waters, and are easily distinguishable from flowing waters.[339]

Justice Kennedy is correct that the dissent ignores "the requirement that the word 'navigable' in 'navigable waters' be given some importance."[340] Although the *Riverside Bayview* decision had stated that navigability was of limited import in determining the Act's scope, the *SWANCC* Court stated that

> it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of

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332. *Id.* at 2264 (Stevens, J., dissenting).
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.* at 2264-65.
337. *See supra* notes 232-35, 241-45, 267, 269-77 and accompanying text.
338. *Rapanos*, 126 S. Ct. at 2242-43 (Kennedy, J., concurring).
339. *Id.* at 2244-47.
340. *Id.* at 2247.

> showing us what Congress had in mind as its authority for enacting the [Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[341]

The dissent tried to limit *SWANCC* to its facts of excluding isolated waters from the Act's jurisdiction,[342] but Justice Kennedy rightly reads the case as also requiring that waters within the Act's jurisdiction have some relationship to navigable waters.[343] Thus, the dissenters' deferential approach to the Corps' regulations in *Rapanos* is inconsistent with *SWANCC*'s emphasis that navigability still matters. It is not surprising that the four *Rapanos* dissenters had all also dissented in *SWANCC*.[344]

In a prior article, the author predicted that the Court would use the "significant nexus" phrase in *SWANCC* as its key jurisdictional test for the Act because it was the only possible standard in that case to give some meaning to the case's statement that navigability still had some "import" in defining the scope of the Act.[345] The First, Fourth, Fifth, Sixth and Tenth Circuits have all used the "significant nexus" test as a key test for determining the Act's jurisdiction, although the Fifth Circuit defined the test much more narrowly than the other circuits to so far include only wetlands adjacent to navigable waters.[346] For example, the Fourth Circuit in *United States v. Deaton* found that there was a sufficient nexus between tributary wetlands and navigable to allow the government to exercise "jurisdiction over the whole tributary system of any navigable waterway," including roadside ditches.[347] The Sixth and Tenth Circuits have explicitly endorsed *Deaton*'s approach to the significant nexus test as applied to tributaries and decisions in the First and Seventh Circuits have praised *Deaton*.[348] The Ninth Circuit in *Baccarat Fremont Developers, LLC v.*

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341. Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2003).

342. *Rapanos*, 126 S. Ct. at 2256-57 (Stevens, J., dissenting).

343. *Id.* at 2242-43 (Kennedy, J., concurring).

344. *See supra* note 136 and accompanying text.

345. Mank, *supra* note 4.

346. United States v. Hubenka, 438 F.3d 1026, 1033-34 (10th Cir. 2006); United States v. Johnson, 437 F.3d 157, 170, 175, 180-81 (1st Cir. 2006), *vacated and remanded*, No. 05-1444, 2006 WL 3072145 (1st Cir. Oct. 31, 2006); United States v. Rapanos, 376 F.3d 629, 639-41 (6th Cir. 2004), *vacated and remanded*; 126 S. Ct. 2208 (2006); *In re* Needham, 354 F.3d 340, 347 (5th Cir. 2003); United States v. Deaton, 332 F.3d 698, 712 (4th Cir. 2003); *infra* notes 347-50, 417 and accompanying text.

347. *Deaton*, 332 F.3d at 712.

348. *Hubenka*, 438 F.3d at 1034; United States v. Rapanos, 339 F.3d 447, 452 (6th Cir. 2003); *see also Johnson*, 437 F.3d at 169-81 (stating that *Deaton* "provides helpful methodological and substantive guidance"); United States v. Gerke Excavating, Inc., 412 F.3d 804, 807 (7th Cir. 2005) ("Whether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the Act."), *vacated and remanded*, 126 S. Ct. 2964 (2006),

United States Army Corps of Engineers,[349] however, stated that "case-by-case" application of the "significant nexus" test was not required to find jurisdiction under the CWA, although the Court went on to apply the test anyway and found that it had been met.[350] The fact that several different courts of appeals had emphasized the importance of the "significant nexus" test before Justice Kennedy's *Rapanos* opinion is strong evidence that it is a useful approach to understanding the Court's precedent in *Riverside Bayview* and *SWANCC*.

Adopting the "significant nexus" test has the advantage of making *Rapanos* consistent with *SWANCC*. Conversely, there is a strong argument that Justice Kennedy's approach to the "significant nexus" test will mean a great deal of work for the Corps, but in the end, the use of the test will result in little actual change in how they define wetlands because of Justice Kennedy's expansive interpretation of the test. Justice Kennedy broadly defined the "significant nexus" test in light of the ecological goals of the Act, to "'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[351] Thus, he stated that wetlands are within the Act's jurisdiction if they "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[352] The dissenting opinion emphasized similar ecological factors.[353]

In a prior article, this author argued that the Court should define significant nexus in terms of whether there is a significant hydrological connection between wetlands and navigable waters.[354] A minor hydrological connection would be insufficient. Justice Kennedy agreed that drains, ditches, and streams carrying only a minor volume of water to navigable waters should be excluded from the Act.[355] My approach would have allowed the consideration of ecological factors only as a tie breaker in close cases where the hydrological flow was moderate in volume.[356] Unlike the plurality opinion, my approach would have allowed courts to consider groundwater hydrological connections between wetlands and navigable waters, although I acknowledged that whether groundwater is included within the Act is a close and difficult issue.[357]

The approach in my prior article had both advantages and disadvantages

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modified 464 F.3d 723 (7th Cir. 2006) (per curiam); United States v. Deaton, 332 F.3d 898, 704-12 (4th Cir. 2003).

349. 425 F.3d 1150 (9th Cir. 2005).

350. *Id.* at 1157-58 ("We note that even if the CWA did require demonstration of a significant nexus on a case-by-case basis (which it does not), there is no question that one exists here.").

351. United States v. Rapanos, 126 S. Ct. 2208, 2248 (2006) (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a) (2000)).

352. *Id.*

353. *Id.* at 2257 (Stevens, J., dissenting).

354. Mank, *supra* note 4, at 821-22, 883-91.

355. *Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring).

356. Mank, *supra* note 4, at 821-22, 883-91.

357. *Id.* at 888-89.

compared to Justice Kennedy's broad ecological interpretation of *SWANCC*'s significant nexus test. There is an advantage in focusing on only whether there is a significant hydrological connection because a single factor is easier for the Corps and courts to measure than the myriad of issues that are involved in ecological connections. The disadvantage is that ecological factors are a major goal in the Act's general purposes, although not necessarily within its definition of "navigable waters" or "waters of the United States."[358] My approach included the consideration of ecological factors in "close cases." The difference between my test and Justice Kennedy's would be primarily in cases where there is no, or only a minor hydrological connection between a particular wetlands and navigable waters, but where there are still significant ecological impacts between them.[359] An unspoken factor in formulating my approach was my belief that the *SWANCC* decision suggested that a majority of the Court wanted a significantly narrower jurisdiction for the Act than the approach in the Corps 1977 regulations. It was not until *Rapanos* that it became clear that there were significant differences between Justice Kennedy and Justices Scalia and Thomas, who had all joined the *SWANCC* majority.

As the dissent argued, Justice Kennedy's inclusion of ecological factors in his "significant nexus" test will likely mean that the Corps will regulate almost as many wetlands as it does under its current regulations, but that his new test will likely require the Agencies to spend significant time and resources to issue new guidance or regulations justifying the regulation of these same wetlands.[360] In fact, his approach could allow the government to regulate for the first time wetlands that are not adjacent to tributaries that have a significant ecological impact on navigable waters.[361] Additionally, before it issues new regulations or guidance, the Corps and the lower courts will spend significant effort applying the new test on a case-by-case basis in reviewing remanded, appealed and new cases. As Chief Justice Roberts suggests, there may be considerable uncertainty in the lower courts until the Agencies issue new regulations or guidance.[362]

In light of all this extra work and uncertainty, it would have been easier if Justice Kennedy had simply joined the dissenting opinion, but in light of his vote with the *SWANCC* majority opinion, he likely found himself unable to join with the four justices who had dissented in *SWANCC*. In the areas of national power and federalism, Justice Kennedy has taken a centrist position that seeks a middle ground between Justice Scalia's states' rights philosophy and Justice Stevens's support for broad national power.[363] Thus, Justice Kennedy took a middle position using the "significant nexus" test as the foundation of his position.

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358. 33 U.S.C. § 1362(7) (2000).

359. *Id.* at 821-22, 883-91.

360. *Rapanos*, 126 S. Ct. at 2264-65 (Stevens, J., dissenting).

361. *Hoped-For Guidance About Wetlands Fails to Materialize in Closely Watched Case*, SUPREME COURT TODAY, 75 U.S.L.W. 3053 (2006) (reporting Virginia Albrecht stated Kennedy's nexus test allows non-adjacent wetlands to be jurisdictional under Act).

362. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

363. Bilionis, *supra* note 26, at 1354, 1376-82.

3. The Contrast Between Textualist and Purposivist Statutory Interpretation.—The most important underlying difference among the three main opinions in *Rapanos* was between the textualist method of statutory interpretation used by Justice Scalia and the purposivist approaches of Justices Kennedy and Stevens.[364] There are three main approaches to statutory interpretation, although individual judges vary to lesser degrees in how they interpret a statute: (1) intentionalism, (2) purposivism, and (3) textualism.[365] First, judges who primarily follow an "intentionalist" approach to interpretation usually examine both a statute's text and its legislative history, along with other contextual evidence in some cases, to determine the original intent of the enacting legislature.[366] Second, judges who adopt a purposivist approach to interpretation are more willing to look beyond the legislature's original intent to assess the statute's goals or purposes because it may be impossible to determine the original legislature's intent or a court must apply a statute to circumstances that the enacting legislature did not anticipate.[367] As discussed below, advocates of textualism have criticized both intentionalism and purposivism as flawed in several respects, especially by giving judges too much discretion to use inferred statutory intent or purposes as license to adopt an interpretation suiting the judge's policy preferences.[368]

Third, judges have always given significant emphasis to a statute's text in discerning its meaning, but since the 1980s, Justice Scalia, along with Justice Thomas and a number of judges on the lower federal courts, have promoted a comprehensive modern textualist approach to interpretation, sometimes referred to as "new textualism,"[369] which argues that courts should interpret a statute by determining how a hypothetical "ordinary reader" of a statute would have understood its words at the time of its enactment to find the statute's meaning.[370] Modern textualists contend that courts should be faithful agents of what the legislature commands in a statute and not examine the often conflicting reasons or intents that led individual legislators to vote for the statute.[371] They usually

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364. Dorf, *supra* note 20.

365. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority and Deference to Executive Agencies*, 86 KY. L.J. 527, 528-42 (1998) [hereinafter Mank, *Textualism*].

366. Eskridge & Frickey, *supra* note 365, at 326-27; Mank, *Textualism*, *supra* note 365, at 529.

367. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 25-34 (1994); Mank, *Textualism*, *supra* note 365, at 529.

368. Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 819 (2002) [hereinafter Mank, *Context*]; Mank, *Textualism*, *supra* note 365, at 535-38.

369. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990)

370. ANTONIN SCALIA, A MATTTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-23 (1997); Mank, *Textualism*, *supra* note 365, at 533-34.

371. Mank, *Context*, *supra* note 368, at 819; Mank, *Textualism*, *supra* note 365, at 533-37.

oppose the use of legislative history to determine statutory meaning because such material is not presented for the approval of the President as is required by the Constitution and since it is frequently written by a small number of legislators or their staff and may not be reflective of the entire legislature.[372] Additionally, modern textualist judges often argue that judges have sometimes misused legislative history by selectively using snippets to justify personal policy preferences.[373] Textualist judges will consider explicit legislative purposes in a statute, as Justice Scalia did in discussing the Act's policy of placing primary responsibility for planning the development and use of land and water resources in the hands of the states,[374] but they are usually suspicious of judges who emphasize legislative purpose because purposivism gives judges broad discretion to consider legislative history, broader contextual material, or inferred legislative intent to find a statute's purpose.[375] Although there are differences among them in the extent to which they consider non-textual material, textualist judges normally place greater weight on the meaning of a statute's text than any other factor.

Before considering criticisms of textualism, it is important to recognize that all judges are "presumptive textualists" who "follow relatively clear statutory language absent some strong reason to deviate from it."[376] Critics of textualism often argue that statutory language is ambiguous or confused more often than Justice Scalia or other textualists are willing to concede and therefore that it is helpful to consider additional information such as legislative history to understand its meaning, intent, or purpose.[377] Textualists often ignore or undervalue the statutory interpretations of administrative agencies in understanding the meaning of a statute that Congress delegated for an agency to enforce.[378] Professor Eskridge has accused Justice Scalia of practicing a "dogmatic textualism" that stubbornly rejects non-textualist evidence about a statute's meaning.[379]

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372. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring); SCALIA, *supra* note 370, at 29-37; Mank, *Textualism*, *supra* note 365, at 535-37.

373. *See Cardoza-Fonseca*, 480 U.S. at 452-53 (Scalia, J., concurring) (arguing that if statutory text has "plain meaning" it is unnecessary to examine statute's legislative history); SCALIA, *supra* note 370, at 29-37 (criticizing legislative history as unreliable and arguing that it is inappropriate to use such history to seek for statute's intent; instead, judges should focus on statute's meaning); Mank, *Textualism*, *supra* note 365, at 535-37.

374. United States v. Rapanos, 126 S. Ct. 2208, 2223-25 (2006) (Scalia, J., plurality opinion) (citing 33 U.S.C. § 1251(b) (2000)).

375. Mank, *Context*, *supra* note 368, at 819; Mank, *Textualism*, *supra* note 365, at 537-38.

376. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408 n.119 (1993).

377. *See* Mank, *Textualism*, *supra* note 365, at 540-41 (arguing text alone is not best guide to statutory meaning); Mank, *Textualist Approach*, *supra* note 307, at 1267-78 (considering legislative history leads to better understanding of statutory meaning).

378. *See* Mank, *Textualist Approach*, *supra* note 307, at 1278-90.

379. ESKRIDGE, *supra* note 367, at 120.

Faithful to his approach to statutory interpretation, Justice Scalia's plurality opinion focused on the meaning of the statute's text in light of the common meaning of the words in a dictionary.[380] He arrogantly assumed that he could find the Act's meaning in this way and dismissed the possibility that the text was ambiguous enough to justify the Corps' interpretation.[381]

Commentators have identified Justices Stevens and Breyer as the current justices most identified with a purposivist approach to statutory interpretation.[382] Accordingly, it is not surprising that Justice Stevens's dissenting opinion focused on the Act's underlying purposes and that Justice Breyer joined that opinion.[383] Based on the Act's broad purposes and Congress' intent to give the Corps wide discretion to achieve those purposes, Justices Stevens's dissenting opinion argued that the Corps' wetlands regulations were justified in claiming jurisdiction over all tributary wetlands.[384]

In 1994, Professor Eskridge characterized Justice Kennedy's approach to statutory interpretation as "lenient textualism."[385] Compared to Justice Scalia, Justice Kennedy is more willing to consider legislative history and other factors besides a statute's text.[386] In *Rapanos*, Justice Kennedy recognized that the Court could not find the precise intent of the Congress that enacted the 1972 Act in using the terms "navigable waters" and "waters of the United States" to describe the Act's jurisdiction because those words do not provide the type of clear definition that was possible when the United States regulated only actually navigable waters. Although the scope of the Act's jurisdiction is not precise, he argued, however, that the Act's use of the term "navigable waters" limited its jurisdictional scope to waters having a "significant nexus" to navigable waters and that the Corps' regulations were deficient because they did not demonstrate the existence of such a nexus for all the wetlands that it regulated.[387] Because it was not possible to ascertain the precise intent of Congress as to which waters are covered by the Act, he interpreted the term "significant nexus" in light of the Act's broad ecological purposes.[388] Justice Kennedy's approach was closer on the whole to Justice Stevens's dissenting opinion because both focused on the statute's purposes more than its ambiguous text, although they did not agree on

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380. *See generally supra* notes 364-79 and accompanying text.

381. *See supra* notes 364-79 and accompanying text.

382. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 428-29 (1998) (interpreting statute in light of its purpose); Lewis v. United States, 523 U.S. 155, 160 (1998) (same); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3 n.4 (2001) (stating Justices Stevens and Breyer often take a purposivist approach).

383. *See supra* notes 195-31 and accompanying text.

384. *See supra* notes 195-31 and accompanying text.

385. ESKRIDGE, *supra* note 367, at 120.

386. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4, 610-12 (1991) (considering legislative history); Mank, *Context*, *supra* note 368, at 826.

387. United States v. Rapanos, 1265 S. Ct. 2208, 2236 (2006) (Kennedy, J., concurring); *see also supra* notes 263-77 and accompanying text.

388. *See supra* notes 269, 277 and accompanying text.

the amount of deference owed to the Corps' interpretation.

IV. THE FUTURE

A. How Will the Lower Courts Apply Rapanos?

1. United States v. Chevron Pipe Line Company.—In late June 2006, shortly after the *Rapanos* decision, in *United States v. Chevron Pipe Line Co.*,[389] the U.S. District Court for the Northern District of Texas criticized the "significant nexus" test in *Rapanos* as failing to provide guidance because the test was "vague" and "subjective."[390] Instead, the district court followed the Fifth Circuit's prior precedent giving a narrow interpretation of the scope of the Act in an opinion that was closer to the plurality opinion than Justice Kennedy's opinion. The court held the defendant Chevron Pipe Line Company is not subject to CWA or Oil Pollution Act (OPA)[391] civil penalties that the U.S. Government sought to impose for an oil spill into the dry channel of an intermittent stream because the waters in question did not have a significant nexus with navigable waters subject to jurisdiction under the statutes.[392] The streams were dry at the time that a leaking Chevron pipeline spilled 3000 barrels of crude oil into an unnamed intermittent channel/tributary that is usually dry unless there is a significant rainfall event.[393] The unnamed channel/tributary joins the intermittent Ennis Creek, which is dry unless there is rainfall, approximately 500 feet from the location of the spill; Ennis Creek then flows 17.5 river miles into the intermittent Rough Creek, which creek flows 23.8 river miles to its confluence with the Double Mountain Fork of the Brazos River.[394]

U.S. District Judge Cummings stated that the Supreme Court's decision in *Rapanos* had "failed to reach a consensus of a majority as to the jurisdictional boundary of the CWA."[395] He observed, "Justice Kennedy wrote his own concurring opinion and advanced an ambiguous test-whether a 'significant nexus' exists to waters that are/were/might be navigable."[396] The district court criticized the test as unworkable. "This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?"[397] By contrast, Judge Cummings discussed the plurality opinion's view that "the waters of the United States" as including

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389. 437 F. Supp. 2d 605 (N.D. Tex. 2006).

390. *Id.* at 613.

391. The OPA's jurisdiction is defined by the same "navigable waters" standard as the Clean Water Act. *See* 33 U.S.C. § 2701(21) (2000) (defining "navigable waters" as "the waters of the United States, including the territorial sea").

392. *Chevron Pipe*, 437 F. Supp. 2d at 608-15.

393. *Id.* at 607.

394. *Id.* at 608.

395. *Id.* at 613.

396. *Id.*

397. *Id.*

only relatively permanent, standing or continuously flowing bodies of water without any criticism, unlike his critical evaluation of Justice Kennedy's "significant nexus" test. The district court stated, "the plurality looked to the statutory wording of the CWA and gave it its plain and literal meaning-a constructionist viewpoint." [398]

Judge Cummings concluded, "[b]ecause Justice Kennedy failed to elaborate on the 'significant nexus' required, this Court will look to the prior reasoning in this circuit."[399] In *In re Needham*,[400] the Fifth Circuit stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters."[401] In deciding whether an oil spill affected "navigable waters," the *Needham* court concluded, "the proper inquiry is whether . . . the site of the farthest traverse of the spill, is *navigable-in-fact* or adjacent to an open body of navigable water."[402] Although the district court did not mention this statement, the *Needham* court had also stated, "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway."[403] The district court in *Chevron Pipe* determined, "as a matter of law in this circuit, the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow."[404] The district court's and presumably the Fifth Circuit's approach is closer to the *Rapanos* plurality opinion than Justice Kennedy's opinion.

Following *Needham* and the *Rapanos* plurality opinion, the district court found that the intermittent streams at issue in its case were not within the jurisdiction of the CWA or OPA.[405] Addressing Chevron's motion for summary judgment, the court stated "this Court must look to see if there is a genuine issue of material fact as to whether the farthest traverse of the spill is a navigable-in-fact water or adjacent to an open body of navigable water."[406] The government argued that during an average month there would be enough rain to cause the oil deposited in the intermittent stream to flow into the Brazos River.[407] The court rejected this "speculation" as failing to show "whether any oil from the spill actually reached 'the navigable waters of the United States'—as that term is

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398. *Id.*
399. *Id.*
400. 354 F.3d 340 (5th Cir. 2003).
401. *Id.* at 345.
402. *Id.* at 346 (emphasis added).
403. *Id.* at 347.
404. *Chevron Pipe*, 437 F. Supp. 2d at 613.
405. *Id.* at 613-15.
406. *Id.* at 613.
407. *Id.* at 614-15.

defined in *Needham* or in the Supreme Court's plurality opinion in *Rapanos*."[408] The district court treated the *Needham* opinion and *Rapanos* plurality opinion as the operative law rather than Justice Kennedy's opinion. The court did refer to the "significant nexus" test in finding that the stream was not within the jurisdiction of the OPA or CWA, but it defined that nexus in light of the Fifth Circuit's approach to the jurisdiction of the two statutes. "Thus, absent actual evidence that the site of the farthest traverse of the spill is *navigable-in-fact* or adjacent to an open body of navigable water, the Court finds that a 'significant nexus' is not present under the law of this circuit."[409]

Because Chevron argued that there had been no rain at the time of the spill and the government produced no evidence of any rainfall, the district court granted Chevron's motion for summary judgment.[410] In its conclusion, the court emphasized the *Rapanos* plurality opinion, stating, "based upon the arguments contained in Chevron's Brief . . . as well as the Fifth Circuit's reasoning contained in *In re Needham* and the Supreme Court's plurality opinion in *Rapanos v. United States*, this Court finds that the subject discharge of oil did not reach navigable waters of the United States."[411] In a footnote, the court "conclude[d] that the United States has failed to establish a 'significant nexus' with competent summary judgment evidence."[412]

The district court relied more on the plurality opinion than Justice Kennedy's significant nexus test. Indeed, the court dismissed the significant nexus test as unworkable. The court implied that the Fifth Circuit's *Needham* opinion was closer to the plurality opinion

The *Chevron Pipe* decision may have little influence in other circuits that do not have the Fifth Circuit's unique history of narrowly construing the Act. For example, the Tenth Circuit in *Hubenka* explicitly disagreed with the Fifth Circuit's approach, stating, "The Supreme Court's opinion in *SWANCC* does not compel such a narrow interpretation of the phrase 'significant nexus.'"[413] The First Circuit has also explicitly rejected the Fifth Circuit's approach.[414] As is discussed in the next section, the law in other circuits is also inconsistent with the Fifth Circuit's narrow interpretation of the Act.

2. The First, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits Will Likely Follow Justice Kennedy's Approach.—Citing *Marks*, the Ninth Circuit in *Healdsburg* stated that "Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law."[415] Similarly, the Seventh Circuit in *Gerke* also cited *Marks* in concluding

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408. *Id.* at 614.

409. *Id.* at 615 (emphasis in original).

410. *Id.* at 614-15.

411. *Id.* at 615.

412. *Id.* at 615 n.15.

413. United States v. Hubenka, 438 F.3d 1026, 1033-34 (10th Cir. 2006).

414. United States v. Johnson, 437 F.3d 157, 170 n.16 (1st Cir. 2006), *vacated and remanded*, No. 05-1444, 2006 WL 3072145 (1st Cir. Oct. 31, 2006).

415. N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006). The

that Justice Kennedy's test should be followed except in the rare case when the plurality's approach would give greater federal jurisdiction under the CWA.[416] Based on past precedent, the First, Fourth, Sixth, and Tenth Circuits will also more likely follow Justice Kennedy's "significant nexus" test rather than the plurality opinion because these circuits had limited *SWANCC* to its facts and allowed the Corps to regulate tributary wetlands or similar wetlands if there is any hydrological connection between them and navigable waters.[417] For example, in *Deaton*, the Fourth Circuit found a sufficient hydrological connection between wetlands adjacent to a manmade ditch that flowed over several miles into tributaries that eventually reached a navigable river.[418]

The *Deaton* court's approach of approving the Corps broad regulation of wetlands next to nonnavigable tributaries has been adopted in the Sixth and Tenth Circuits and has also strongly influenced decisions in the First and Seventh Circuits.[419] Citing *Deaton*, the Sixth Circuit in *Rapanos* found jurisdictional wetlands even though water from them had to travel twenty miles to reach navigable waters and in *Carabell* the Circuit found jurisdiction over wetlands

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Healdsburg court also stated that *Rapanos* had narrowed *Riverside Bayview* by requiring the Government to prove that even wetlands adjacent to a navigable river have a "significant nexus" with that river. *Id.* at 1030. That conclusion is a misreading of *Rapanos*, which did not change *Riverside Bayview*'s holding that wetlands adjacent to a navigable river are always within the Act's jurisdiction. E-mail from Jonathan H. Adler to envlawprofessors (Aug. 11, 2006) (on file with author); E-mail from Steve Johnson, to envlawprofessors (Aug. 11, 2006) (on file with author).

416. United States v. Gerke, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam).

417. Before *Rapanos*, six of the circuit courts of appeal limited *SWANCC* to its facts and read the Act's jurisdiction broadly to include wetlands near non-navigable waters that eventually flow into navigable waters. *See, e.g.*, *Hubenka*, 438 F.3d at 1033-34; *Johnson*, 437 F.3d at 170, 175, 180-81 (allowing Corps to regulate wetlands on cranberry farm); United States v. Gerke, 412 F.3d 804 (7th Cir. 2005), *vacated and remanded*, 126 S. Ct. 2964 (2006), *modified* 464 F.3d 723 (7th Cir. 2006) (per curiam); United States v. Rapanos, 376 F.3d 629, 634 (6th Cir. 2004), *vacated and remanded* 126 S. Ct. 2208 (2006); United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003) (holding Corps has jurisdiction over wetlands adjacent to non-navigable drainage ditch, which is eventual tributary to navigable waters); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 528-34 (9th Cir. 2001); Robin Kundis Craig, *Beyond* SWANCC: *The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113, 132-34 (2003) ("The emerging majority rule among the federal courts and EPA ALJs is that any surface water connection to waters that are navigable in the traditional sense—however intermittent, convoluted, or human-made the connection might be—is sufficient to confer CWA jurisdiction over a water body."); Mank, *supra* note 4, at 866-79 (discussing cases reading *SWANCC* narrowly and Clean Water Act broadly).

418. *See Deaton*, 332 F.3d at 702.

419. *See Hubenka*, 438 F.3d at 1034; United States v. Rapanos, 339 F.3d 447, 452 (6th Cir. 2003); *see also Johnson*, 437 F.3d at 169-81; *Gerke*, 412 F.3d at 807 ("Whether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the Act."); *Rapanos*, 339 F.3d at 450-53; *Deaton*, 332 F.3d at 704-12.

that are usually separated from hydrological waters by a berm.[420] In *Hubenka*, the Tenth Circuit concluded that the Corps had jurisdiction over the defendants' filling and building dikes in the nonnavigable tributary of a navigable river.[421] In *Gerke*, the Seventh Circuit held that the Corps had jurisdiction over wetlands next to a nonnavigable man-made ditch that "runs into a nonnavigable creek that runs into the nonnavigable Lemonweir River, which in turn runs into the Wisconsin River, which is navigable."[422] Stating that *Deaton* "provides helpful methodological and substantive guidance,"[423] the First Circuit in *Johnson* held the Corps had jurisdiction over wetlands that are located near cranberry bogs on a farm because the wetlands are hydrologically connected to the navigable Weweantic River through nonnavigable tributaries, but the First Circuit vacated this decision in the wake of *Rapanos* and remanded the case to the district court.[424]

Justice Scalia, in his plurality opinion, sharply disagreed with cases adopting the mere hydrological connection approach because many of the "tributaries" are intermittent, stating:

> Even after *SWANCC*, the lower courts have continued to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as "tributaries." For example, courts have held that jurisdictional "tributaries" include the "intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64)," *Treacy v. Newdunn Assoc.*, 344 F.3d 407, 410 (C.A.4 2003); a "roadside ditch" whose water took "a winding, thirty-two-mile path to the Chesapeake Bay," *United States v. Deaton*, 332 F.3d 698, 702 (C.A.4 2003); irrigation ditches and drains that intermittently connect to covered waters, *Community Assn. for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943, 954-955 (C.A.9 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (C.A.9 2001); and (most implausibly of all) the "washes and arroyos" of an "arid development site," located in the middle of the desert, through which "water courses . . . during periods of heavy rain," *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (C.A.9 2005).[425]

The Seventh and Ninth Circuits have already endorsed Justice Kennedy's "significant nexus" test as the standard for determining federal jurisdiction under the CWA, except in the rare case where the plurality's approach would provide greater jurisdiction.[426] In light of their prior precedent broadly interpreting the

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420. *See supra* notes 239-40, 287-90 and accompanying text.
421. *Hubenka*, 438 F.3d at 1034-36.
422. *Gerke*, 412 F.3d at 805-08.
423. *Johnson*, 437 F.3d at 170.
424. *Id.* at 160-64, 169-81.
425. Rapanos v. United States, 126 S. Ct. 2208, 2217-18 (2006).
426. *See supra* notes 415-16 and accompanying text.

Act's jurisdiction over tributaries, the First, Fourth, Sixth and Tenth Circuits are more likely to follow Justice Kennedy's "significant nexus" test rather than the plurality opinion's approach.[427]

B. Will the Corps Issue New Regulations?

On July 5, 2006, the Corps regulatory branch chief Mark Sudol sent via e-mail an "interim guidance" to Corps district officials stating that the Corps and EPA planned to issue joint guidance "in the near future" that would clarify the Agencies' CWA jurisdiction to make it consistent with *Rapanos*.[428] The Sudol guidance stated that the Agencies may

> make some changes in how we describe and document the justifications that underlie some of our CWA jurisdictional determinations (JDs). In other words, the tests that we cite and the facts that we document in some of our JD administrative records will probably change somewhat, to insure that our JDs reflect the Supreme Court's most recent legal tests for asserting CWA jurisdiction.[429]

This language suggests that the Agencies may make only moderate changes to justify how they currently make CWA jurisdictional determinations rather than the sweeping changes limiting their jurisdiction that Justice Scalia would prefer.[430] The Sudol guidance asked Corps personnel not to take any public position "in court pleadings or in any sort of dealings with outside parties" on the scope of CWA jurisdiction until the agencies issued their joint guidance.[431] Ann Klee, then general counsel for the EPA, similarly urged EPA attorneys not to use *Rapanos* in their pleadings until the Agencies issue new guidance "in the near future."[432] The Sudol guidance also asked staff to restrict their enforcement actions and permit authorizations to traditional navigable waters unless they receive authorization from headquarters.[433]

On August 1, 2006, before a Senate subcommittee hearing on *Rapanos*,

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427. *See supra* notes 417-24 and accompanying text.

428. Memorandum from Mark Sudol to Various Army Corps Staff, Interim Guidance on the *Rapanos* and *Carabell* Supreme Court Decision (July 5, 2006) (on file with author) [hereinafter Sudol Memorandum]; Amena H. Saiyid, *Corps of Engineers, EPA Preparing Guidance In Wake of U.S. Supreme Court Decision*, 37 ENV'T REP. (BNA) 1520 (2006) (discussing Sudol "interim guidance").

429. Sudol Memorandum, *supra* note 428, at 1.

430. Matt Shipman, *Memo Hints At Limited EPA, Corps Clean Water Changes After* Rapanos *Ruling*, INSIDE EPA, June 10, 2006, *available at* http://www.aswm.org/wbn/epa_rapanos_memo.pdf.

431. Sudol Memorandum, *supra* note 428, at 1-2.

432. Andrew S. Neal, *Federal Lawyers Discuss Development of Law After Supreme Court Decision in* Rapanos, 37 ENV'T REP. (BNA) 1521 (2006) (quoting Ann Klee, general counsel for the EPA).

433. Sudol Memorandum, *supra* note 428, at 2-3.

Benjamin Grumbles, EPA Assistant Administrator for Water, and Army Assistant Secretary for Civil Works John Paul Woodley, Jr. presented a joint written statement that the Agencies were "working quickly" to issue joint interim guidance in the near future to address the CWA jurisdictional issues raised by the decision and might issue additional guidance if it were needed to refine the guidance.[434] Grumbles stated that "[w]e have no schedule, but we expect to issue [the guidance] as soon as possible."[435] Woodley stated that the guidance would address how to apply the "significant nexus" standard.[436] In response to Sen. Lisa Murkowski's (R-AK) request that the Agencies issue new regulations, rather than unenforceable guidance, Grumbles and John C. Cruden, Deputy Assistant Attorney General for the Environment and Natural Resources Division, replied that the agencies were considering regulations, but that issuing guidance would take less time and, therefore, would provide regulatory clarity sooner than issuing regulations.[437]

On September 26, 2006, the Corps published in the Federal Register a proposal to reissue and modify its nationwide wetland permits ("NWPs") beginning in 2007 and solicited public comment on the proposal.[438] The proposal briefly observed that the Supreme Court's *Rapanos* decision raised questions about its jurisdiction over wetlands that would be addressed on a case-by-case basis by the DOJ and by any future guidance issued by the DOJ and other agencies.[439] Implicitly rejecting the "permanent stream" approach of the plurality opinion, the Corps stated that "[w]e are proposing to provide greater protection for ephemeral streams" by applying the 300 linear foot limit for loss of stream bed to ephemeral streams; the 2002 NWPs applied the 300 linear foot limit only to perennial and intermittent stream beds.[440] The Corps proposed expansion of its jurisdiction in the proposed 2007 NWPs program suggests that the forthcoming guidance on wetlands jurisdiction may also take an expansive view of that jurisdiction.

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434. *Hearing Concerning Recent Supreme Court Decisions Dealing with the Clean Water Act Before the S. Subcomm. on Fisheries, Wildlife and Water of the S. Comm. on Environment and Public Works*, 109th Cong. 13-14 (2006) (statement of Benjamin Grumbles, EPA Assistant Administrator for Water, and John Paul Woodley, Jr., Army Assistant Secretary for Civil Works).

435. Amena H. Saiyid, *EPA, Corps of Engineers to Issue Guidance on* Rapanos *Decision 'As Soon as Possible,'* 37 ENV'T REP. (BNA) 1626 (Aug. 4, 2006).

436. *DOJ Plan for Dual Wetlands Jurisdiction Test Wins Cautious Backing*, INSIDE THE EPA (Aug. 4, 2006), *available at* 2006 WLNR 13395727, at *4 [hereinafter *DOJ Plan for Dual Wetlands Jurisdiction*].

437. *Id.*

438. Proposal to Reissue and Modify Nationwide Permits, 71 Fed. Reg. 56,258 (Sept. 26, 2006).

439. *Id.* at 56,261.

440. *Id.*

C. The Department of Justice Adopts Justices Stevens's Approach of Following Either the Plurality or Justice Kennedy's Concurrence

In its Motion for Remand in the *Rapanos* case, the DOJ agreed with Justice Stevens's dual approach that the government should have jurisdiction over wetlands if the wetlands at issue meet either the plurality's test or Justice Kennedy's "significant nexus" standard because the four dissenting justices would have affirmed the government's jurisdiction and, hence, only one additional vote is needed for the government to prevail.[441] The Motion stated:

> When no majority opinion exists in a decision of the Supreme Court, controlling legal principles may derive from those principles espoused by five Justices. See Marks v. United States, 430 U.S. 188, 193-94 (1977); cf. LULAC v. Perry, 126 S. Ct. 2594, 2607 (2006). Thus, regulatory jurisdiction under the Clean Water Act (CWA) exists over a wetland if either the plurality's or Justice Kennedy's test is satisfied. 126 S. Ct. at 2265 (Stevens, J., dissenting).[442]

In a lengthy and thoughtful opinion addressing the meaning of *Marks*, the First Circuit in *Johnson* adopted Justice Stevens's dual approach; a Florida federal district court has also endorsed his dual approach.[443]

There is likely to be criticism of the DOJ's dual standard approach. Some environmentalists are unhappy with the dual standard because they believe that it will sow confusion in the lower courts.[444] Professor Adler interprets *Marks* as only authorizing lower courts to consider a plurality opinion and concurring opinions, but not dissenting opinions.[445]

In *Marks*, the Court stated, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[446] There is disagreement about how to apply the *Marks* rule when the plurality and concurring opinions differ substantially.[447] In fact, the Court has acknowledged that it and lower courts in some cases have struggled to apply *Marks*.[448]

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441. Motion for Remand to the District Court for Further Proceedings Regarding Regulatory Jurisdiction, In the United States Court of Appeals for the Sixth Circuit, United States v. Rapanos, No. 03-1489 (July 31, 2006), at 3 (on file with author).

442. *Id.*

443. *See* United States v. Johnson, No. 05-1444, 2006 WL 3072145, at *6-20 (1st Cir. Oct. 31, 2006); *see also* United States v. Evans, No. 3:05CR159J32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006).

444. *DOJ Plan for Dual Wetlands Jurisdiction*, *supra* note 436.

445. *See infra* notes 457-60 and accompanying text.

446. Marks v. United States, 430 U.S. 188, 193-94 (1977); *see also* Posting of Amy Howe to SCOTUSBlog, http://www. scotusblog.com (June 19, 2006 13:30 EST) (quoting Richard Lazarus).

447. *See infra* notes 448-67 and accompanying text.

448. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003); *see also* Nichols v. United States, 511

Some argue that the *Marks* case should not apply to a case like *Rapanos* because there is little overlap and hence no "common denominator" between the concurring and plurality opinions.[449] The *Chevron Pipe* decision did not cite Marks, but it stated that "the Supreme Court [in *Rapanos*] failed to reach a consensus of a majority as to the jurisdictional boundary of the CWA."[450] The Ninth Circuit in *Healdsburg*, however, assumed that the *Marks* rule applied to Justice Kennedy's opinion because it "constitute[ed] the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law."[451] Similarly, the Seventh Circuit in *Gerke* also cited *Marks* and considered the votes of the four dissenting justices in concluding that Justice Kennedy's test should be followed except in the rare case when the plurality's approach would give greater federal jurisdiction under the CWA.[452] Additionally, a Florida federal district court found that there was no common denominator between the plurality opinion and Justice Kennedy's opinion in *Rapanos* and hence no "rule" under *Marks*, but it still endorsed Justice Stevens's dual approach.[453]

Additionally, some lower courts consider not just the overlap between the concurring and the plurality opinions, but also examine other concurring or dissenting opinions.[454] These lower courts seek to find an "implicit agreement" or a "common denominator" between opinions.[455] Under that approach, lower courts could consider the substantial overlap between Justice Kennedy's concurring opinion and the Stevens dissent. The Seventh Circuit in *Gerke* explicitly considered the votes of the four dissenting justices in concluding that Justice Kennedy's test should be followed except in the rare case when the plurality's approach would give greater federal jurisdiction under the CWA.[456]

In a statement presented at the August 1, 2006 Senate subcommittee hearing

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U.S. 738, 745-46 (1994).

449. Posting of Hans Bader to SCOTUSBlog, http://www.scotusblog.com (June 19, 2006 14:00 EST) (arguing *Marks* is inapplicable because Kennedy and the plurality opinion do not "share a common denominator in their approach to deciding the case").

450. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

451. N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006).

452. *See* United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006).

453. *See* United States v. Evans, No. 3:05CR159J32HTS, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006).

454. *See, e.g.*, DeStefano v. Emergency Housing, 247 F.3d 397, 418-19 (2d Cir. 2001); Breyer v. Meissner, 214 F.3d 416, 424-25 (3d Cir. 2000); ACLU v. Schundler, 168 F.3d 92, 103-04 (3d Cir. 1999); Papike v. Tambrands, Inc., 107 F.3d 737, 740-41 (9th Cir. 1997); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1182-83 (2d Cir. 1992); *see* E-mail from Richard Lazarus to ENVLAWPROFESSORS (listserv of environmental law professors, moderated by Professor John Bonine University of Oregon, Bowerman Environmental Law Center) (June 20, 2006) (on file with author) [hereinafter Lazarus E-Mail].

455. Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 428-29 (1992); *see* Lazarus E-mail, *supra* note 454.

456. 464 F.3d 723, 725 (7th Cir. 2006) (per curiam).

on *Rapanos*, Professor Adler interpreted the *Marks* decision to require lower courts to follow those portions of the *Rapanos* decision where the plurality opinion and Justice Kennedy agree and to forbid lower courts from considering the dissenting opinion.[457] He argued that the plurality opinion and Justice Kennedy's opinion agreed that the Act's jurisdiction is limited by the term "navigable waters" and that the Corps' current regulations are too broad and that those points of agreement are the only binding portions of *Rapanos* under the *Marks'* framework.[458] Because nothing in a dissenting opinion is part of the judgment of the court or is legally binding, Adler argues that nothing in a dissent can be part of the Court's holding under the *Marks* rule that the holding of a fragmented Court can be found within the opinions of "those Members who concurred in the judgments on the narrowest grounds."[459] Accordingly, he concludes that lower courts may not treat those areas where Justice Stevens's dissent agrees with Justice Kennedy's opinion as a "'holding'" of the Court.[460]

Professor Buzbee, by contrast, argues that *Marks* allows lower courts to consider the numerous points upon which the dissenting opinion and Justice Kennedy's opinion form a five vote majority.[461] Professor Buzbee contends that Justice Kennedy's opinion agrees far more with the dissenting opinion than with the plurality opinion.[462] This Article comes to the same conclusion.[463] Because Justice Kennedy's opinion coincides more with the dissenting opinion, Professor Buzbee reasons that it is appropriate to treat these two opinions as the majority of the Court under the *Marks* standard. He states:

> In the United States judicial system, five aligned votes by Supreme Court justices make a binding precedent. As indicated by the brief concurring opinion of Chief Justice Roberts, if the Court is splintered, the narrowest opinion, here Justice Kennedy's, would be the key. As the Chief Justice states through his citation to *Marks v. Whitney*, the question is whether a "single rationale explaining the result enjoys the assent of five Justices." Here, Justice Kennedy's concurring *Rapanos* opinion shares substantial overlap with the dissenters' approaches. The dissenters would have deferred even more than Justice Kennedy to regulators' judgments, but in all parts of their opinion, the dissenters would protect waters at least to the extent set forth by Justice Kennedy. They

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457. *Hearing Concerning Recent Supreme Court Decisions Dealing with the Clean Water Act Before the S. Subcomm. on Fisheries, Wildlife and Water of the S. Comm. on Environment and Public Works*, 109th Cong. 4-5 (2006) (written statement of Jonathan H. Alder, Deputy Assistant Attorney General Environment and Natural Resources Division), *available at* http://epw.senate.gov/109th/Adler_Testimony.pdf.

458. *Id.* at 5.

459. *Id.*

460. *Id.*

461. Buzbee Statement, *supra* note 25, at 4-5.

462. *Id.*

463. *See supra* notes 24-25 and accompanying text.

> repeatedly and explicitly agree with the rationales for federal protection set forth in the Justice Kennedy concurrence. Whether taken by itself as the "narrowest opinion," or as an opinion with underlying rationales agreed upon by five justices, Justice Kennedy's opinion is the key.[464]

In a lengthy and thoughtful opinion addressing the meaning of *Marks*, the First Circuit in *Johnson* acknowledged that the *Marks* "narrowest grounds" test "does not translate easily" to the *Rapanos* case because the "cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction."[465] The *Johnson* decision argued that "the Supreme Court itself has moved away from the *Marks* formula" because subsequent Supreme Court decisions had acknowledged that the *Marks* test was difficult to apply and that several members of the Court had considered dissenting opinions in determining what is the opinion of a fragmented Court.[466] Accordingly, the First Circuit concluded that Justice Stevens's approach was the best way to determine the opinion of the *Rapanos* court even if it was inconsistent with the *Marks* test because Stevens's view

> is consistent with the direction that the Court as a whole has taken since *Marks*. Moreover, the fact that Justice Stevens does not even refer to *Marks* indicates that he found its framework inapplicable to the interpretation by the lower courts of the divergent tests laid out by the opinions in *Rapanos*.[467]

The *Johnson* decision's view that the *Marks* test does not apply to the *Rapanos* opinions is sound and provides the best rationale for adopting Justice Stevens's dual approach.

The DOJ Motion also cited, "*cf.*" a Supreme Court case decided the week after *Rapanos* as supporting the view that lower courts may examine all opinions of the Court to determine which view commands a working majority of five. In *League of United Latin American Citizens v. Perry* (*LULAC*),[468] which involved a challenge to the Texas state legislature's 2003 changes to the state's congressional district boundaries, Justice Kennedy authored the majority opinion, which was joined by Justices Stevens, Souter, Ginsburg and Breyer with respect to Parts II-A and III; an opinion with respect to Parts I and IV, which Chief Justice Roberts and Justice Alito joined; and an opinion with respect to Parts II-B and II-C and Part II-D, which Justice Souter and Justice Ginsburg joined.[469] In remarks at a conference, Ann Klee, then the EPA General Counsel, suggested that the *LULAC* decision implies a more flexible approach than *Marks*'s "narrowest grounds" approach and instead finds a majority whenever five

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464. Buzbee Statement, *supra* note 25, at 5.

465. United States v. Johnson, No. 05-1444, 2006 WL 3072145, at *7 (1st Cir. Oct. 31, 2006).

466. *Id.* at *9.

467. *Id.*

468. 126 S. Ct. 2594, 2604 (2006).

469. *Id.*

justices agree on a particular issue even if another set of five justices constitute a majority on other issues.[470] The DOJ Motion, however, cites *Marks* as the primary support for its dual opinion standard and cites *LULAC* only tangentially.[471] Because *LULAC* did not directly address the issue of which Court opinions are binding, *Marks* remains the Court's most important decision on which opinions of a fragmented court are binding on lower courts.

D. Will Congress Pass Legislation?

Congress could pass legislation to resolve the Act's jurisdiction, which it commonly did during the 1970s and 1980s, but since the 1990s it has become more difficult to enact environmental legislation in an increasingly partisan Congress where there is a growing divide between liberal Democrats and conservative Republicans.[472] Even during the less partisan 1970s and 1980s, Congress was unable to agree on legislation to clarify the Act's jurisdiction. In 1977, Congress considered several bills to clarify the Act's jurisdiction, but in the end did not pass any jurisdictional amendments.[473] In 1987, Congress made several significant Amendments to the Act, but did not resolve jurisdictional issues.[474]

In 2005, Democrat Senator Russell Feingold, along with 15 co-sponsoring Democratic Senators, proposed legislation, entitled "The Clean Water Authority Restoration Act of 2005," that would have expanded the Act's jurisdiction to reach to "all waters" that are "subject to the legislative power of Congress under the Constitution" and would strike the term "navigable waters of the United States" in the current statute and replace it with the term "waters of the United States."[475] A similar bill was proposed in the House by Representatives Oberstar (D-MN), Leach (R-IA), Dingell (D-MI) and Boehlert (R-NY) and 155 other House members.[476] Many Democrats and environmentalists support the Feingold

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470. *Texas Redistricting Case Could Complicate High Court Wetlands Ruling*, INSIDE THE EPA, July 28, 2006 (reporting remarks of EPA General Counsel Ann Klee at July 18 forum on *Rapanos* hosted by the Washington Legal Foundation), *available at* 2006 WLNR 12952674. Ms. Klee subsequently resigned as EPA General Counsel.

471. *See supra* note 441 and accompanying text.

472. *See* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 668-74 (2006) (presenting data compiled by the League of Conservation Voters from 1971 until 2004 showing Republicans and Democrats increasingly disagree on environmental issues).

473. Mank, *supra* note 4, at 836.

474. *See* Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7-90 (1987); Lazarus, *supra* note 472, at 628-29.

475. Clean Water Authority Restoration Act of 2005, S. 912, 109th Cong. §§ 4(23), 5(1)-(3) (1st Sess. 2005) (introduced Apr. 27, 2005 and referred to the Committee on Environment and Public Works) (amending the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States).

476. Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong. (1st Sess. 2005)

legislation.[477] Most Republican legislators prefer to wait before considering any legislative changes until after the Bush Administration has time to issue clarifying regulations.[478] By the time the Agencies issue clarifying regulations, many legislators up for reelection will probably have turned their attention to the November 2006 elections and, therefore, any legislative changes to the Act will more likely come in 2007, if at all.

CONCLUSION

The *Rapanos* decision will likely require the Corps to issue new regulations or guidance that more carefully justify its regulation of tributary wetlands, but it is not a revolutionary decision and will not undermine the Corps' current practice of broadly enforcing the Act. The plurality opinion would have drastically limited the scope of the Act by limiting the definition of "waters of the United States" to permanently flowing waters and wetlands that have a physical surface water connection with those waters.[479] A fundamental flaw with the plurality opinion is its excessive reliance on dictionary definitions and textualist methodology to the exclusion of the Act's ecological goals. [480] Thus, the plurality would exclude many significant intermittent streams from the Act's jurisdiction even though they play a significant role in affecting hydrology and ecology in many areas, especially the western areas of the United States. The plurality harshly criticizes the expense of Corps regulations without giving any weight to the value of the wetland resources they protect. [481] It is fortunate for the nation's wetlands that the plurality could not command a majority.

The dissenting opinion appropriately emphasized the Act's ecological purposes in interpreting the statute. Because Congress gave the Agencies broad discretion to fulfill the Act's purposes, the dissenting opinion gave great deference to the Corps' existing regulations, which Republican and Democratic Administrations had supported for thirty years. [482] The dissent failed, however, to acknowledge *SWANCC*'s underlying philosophy that a connection to navigable waters still has some importance in defining the Act's jurisdiction. [483] Probably because all of the *Rapanos* dissenters had dissented in *SWANCC*, they were reluctant to give the latter decision the precedential weight it deserved. [484]

Justice Kennedy appropriately took a middle position that was closer to the

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(introduced Mar. 17, 2005) (amending the Federal Water Pollution Control Act to clarify the Jurisdiction of the United States over Waters of the United States).

477. *Chafee Signals He May Side with Environmentalists on Water Act Scope*, INSIDE THE EPA, July 21, 2006, *available at* 2006 WLNR 12482643.

478. *Id.*

479. *See supra* notes 185-89 and accompanying text.

480. *See supra* notes 185-89 and accompanying text.

481. *See supra* notes 190-94 and accompanying text.

482. *See supra* notes 195, 224 and accompanying text.

483. *See supra* notes 340-42 and accompanying text.

484. *See supra* notes 340-42 and accompanying text.

purposivist dissenting opinion than the textualist plurality opinion. In the areas of national power and federalism, Justice Kennedy has taken a centrist position that seeks a middle ground between Justice Scalia's states right's philosophy and Justice Stevens's support for broad national power.[485] Based upon *SWANCC*'s underlying philosophy that a connection to navigable waters still has some importance in defining the Act's jurisdiction, he used the term "significant nexus" found in one sentence of the case explaining the Court's earlier *Riverside Bayview* decision and made it the cornerstone of a new test for which waters and wetlands are sufficiently connected with navigable waters to come within the Act's jurisdiction.[486] His choice of the "significant nexus" language as the basis for his new jurisdictional test is reasonable because commentators and several lower courts had recognized that it provided the best test for applying the Court's precedent in *Riverside Bayview* and *SWANCC* to cases involving tributary wetlands.[487]

In the end, Justice Kennedy's significant nexus test will likely only modestly limit the scope of the Act because he emphasizes ecological considerations in applying his standard.[488] As the dissent predicts and the plurality acknowledges is a substantial possibility, the Corps will likely be able to issue regulations or guidance based on the significant nexus test that allow it to regulate most of the wetlands that fall within its current regulations because most tributary wetlands have significant ecological or hydrological impacts on navigable waters.[489] Justice Kennedy could have defined the significant nexus test more narrowly to address only hydrological connections, but he adopted a broader definition in light of the Act's broad ecological goals.[490]

In the short term, before the Agencies issue new guidance or regulations, there is likely to be some confusion and disagreement in the lower courts on how to apply the significant nexus test.[491] As the Texas District Court decision in *Chevron Pipe* demonstrates, the impact of the decision will vary somewhat from circuit to circuit based in large part upon how the various circuit courts of appeal had reacted to *SWANCC*.[492] The Seventh and Ninth Circuits have already endorsed Justice Kennedy's "significant nexus" test as the standard for determining federal jurisdiction under the CWA, except in the rare case where the plurality's approach would provide greater jurisdiction.[493] In light of their prior precedent broadly interpreting the Act's jurisdiction over tributaries, the First, Fourth, Sixth, and Tenth Circuits are more likely to follow Justice

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485. Bilionis, *supra* note 26, at 1354, 1376-82.
486. *See supra* notes 324-28, 332 and accompanying text.
487. *See supra* notes 345-50 and accompanying text.
488. *See supra* notes 351-60 and accompanying text.
489. *See supra* notes 217-20, 329-31 and accompanying text.
490. *See supra* notes 263-77 and accompanying text.
491. *See supra* notes 413-14 and accompanying text.
492. *See supra* notes 389-414 and accompanying text.
493. *See supra* notes 415-16 and accompanying text.

Kennedy's "significant nexus" test rather than the plurality opinion's approach.[494] Based on past precedent, more circuits are likely to follow Justice Kennedy's test than the plurality's standard.

The Corps has recognized that it needs to issue at least interim guidance in the near future to assure more consistent resolution of jurisdictional issues.[495] The Corps should consider issuing detailed regulations to clarify any issues not resolved by its new guidance. It is less likely that Congress will be able to achieve sufficient consensus to pass legislation defining the Act's jurisdiction.[496]

494. *See supra* notes 417-24 and accompanying text.

495. *See supra* notes 428-37, 439 and accompanying text.

496. *See supra* notes 472-78 and accompanying text.

STANDARD SETTING, PATENTS, AND ACCESS LOCK-IN: RAND LICENSING AND THE THEORY OF THE FIRM

JOSEPH SCOTT MILLER*

INTRODUCTION

Voluntarily established compatibility standards pervade the information and communications technology ("ICT") sectors, touching everything from basic internet and wireless communication protocols to the design of computer buses, ports, and peripherals. The standards embodied in detailed product and process specifications, which facilitate smooth interoperability among parts provided by competing suppliers, "are an inevitable outgrowth of *systems*, whereby *complementary products work in concert to meet users' needs.*"[1] As the ICT sectors grow in importance, so too do voluntary standard-setting organizations (SSOs).[2]

ICT firms also avidly pursue U.S. utility patents.[3] The rates at which

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1. Carl Shapiro, *Setting Compatibility Standards: Cooperation or Collusion?*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 81, 82 (Rochelle Cooper Dreyfuss et al. eds., 2001) (emphasis in original).

2. *See id.* at 97 ("As more and more products work in conjunction to form systems, interface standards play a bigger and bigger role in the economy. And, as computer and communications systems encompass a larger portion of economic activity, compatibility standards become an ever-more important aspect of competitive strategy."); CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 228 (1999) ("Network economics and positive feedback make cooperation more important than ever. Most companies need to cooperate with others to establish standards and create a single network of compatible users."). For example, demonstrating that standard-setting activity has grown to the point where it attracts the sustained attention of a large numbers of scholars, in 2002 the publisher Idea Group launched an academic journal entitled *International Journal of IT Standards & Standardization Research*. *See* IDEA GROUP, INC., *Int'l J. of IT Standards & Standardization Research*, http://www.idea-group.com/jitsr (last visited Jan. 8, 2007) (describing the journal).

3. Utility patents cover useful, new, and nonobvious products and processes. 35 U.S.C. §§ 101-103 (2000). This is the type of patent that most people think of as simply a patent. The two other types of patents—design patents (which cover new, original, and ornamental designs for articles of manufacture, 35 U.S.C. §§ 171-173 (2000)), and plant patents (which cover distinct and new varieties of plants that are asexually reproduced, 35 U.S.C. §§ 161-164 (2000))—are not

inventors seek and obtain U.S. utility patents have grown significantly since the mid-1980s.[4] With respect to computer technology, this growth has been spurred, at least in part, by two important court decisions squarely embracing the patentability of computer software inventions.[5] Whatever the cause, the annual lists of the top twenty-five recipients of U.S. patents from 1995 to 2003 read like a "Who's Who" of ICT firms: IBM has been the top patent recipient in each of those years; the others include (in alphabetical order) Advanced Micro Devices, Canon, Fujitsu, General Electric, Hewlett-Packard, Hitachi, Intel, Lucent, Matsushita, Micron Technologies, Motorola, NEC Corp., Philips, Samsung, Sharp, Siemens, Sony, Sun Microsystems, Toshiba, Xerox.[6] Their respective patent holdings are, of course, just the tip of the iceberg.

Given that both standard setting and intellectual property ("IP") protection are common to the forward edge of ICT, it is not surprising that "SSOs increasingly encounter situations in which one or more companies claim to own proprietary rights that cover a proposed industry standard."[7] The "[t]wo sets of rules" that overlap in this situation—one for IP, another for interoperability standards on products embodying IP—"are critical for the long-run prospects of the economy."[8] Moreover, the tension created by the union of patent rights (the

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pertinent here.

4. The marked increase in U.S. utility patent application and grant rates is both well-documented and frequently discussed, often in terms of "exploding" growth or an "explosion." *See, e.g.*, Nancy J. Linck et al., *A New Patent Examination System for the New Millennium*, 35 HOUS. L. REV. 305, 307 (1998); Note, *Estopping the Madness at the PTO: Improving Patent Administration Through Prosecution History Estoppel*, 116 HARV. L. REV. 2164, 2165 (2003). For a compact graphical depiction of the growth in annual U.S. utility patent application filings and grants from 1960 to 2001, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 340, fig. 12.1 (2003).

5. *See* AT&T Corp. v. Excel Commc'ns, Inc., 172 F.3d 1352, 1361 (Fed. Cir. 1999) (overturning trial court decision rejecting computer invention as unpatentable subject matter); State St. Bank & Trust Co. v. Signature Fin. Group, Inc., 149 F.3d 1368, 1377 (Fed. Cir. 1998) (same); *see also* John R. Allison & Emerson H. Tiller, *The Business Method Patent Myth*, 18 BERKELEY TECH. L.J. 987, 990-91 & n.7 (2003) (discussing the spike in patent applications on software-embodied business methods in the wake of the *State Street* and *Excel* cases).

6. The pertinent Patent Office report is called "Patenting by Organizations." *See, e.g.*, OFFICE OF ELEC. INFO. PRODS., U.S. PATENT & TRADEMARK OFFICE, PATENTING BY ORGANIZATIONS (2003), *available at* http://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports_topo.htm#TOPO (follow "Links to Report: Patenting by Organizations Report, 2003").

7. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1893 (2002); *see also* Knut Blind & Nikolaus Thumm, *Intellectual Property Protection and Standardization*, 2 J. IT STANDARDS & STANDARDIZATION RES. 61, 63 (2004) ("Since [intellectual property rights] tend[] to concentrate in the areas of greater technical complexity, it becomes virtually impossible to adopt a standard without incorporating proprietary material.").

8. Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 1 (2005).

purpose of which is to encourage investment in innovation by conferring a right to exclude competitors from using a technology) and group-set standards (the purpose of which is to give competing market actors a common, accessible specification around which to build and compete) is fundamental. It is the tension between free access and tight control.[9]

SSOs respond to this tension between common access and proprietary control by choosing an approach to participants' patent rights that falls somewhere along the continuum from closed (i.e., there is no stated patent policy at all, leaving default patent rules in place) to open (i.e., the policy requires participants to make any standard-pertinent patent available to all comers on a royalty free basis).[10] What has come to be the most common patent policy "occup[ies] a middle ground,"[11] requiring those who participate in setting a standard to promise to license, on reasonable and nondiscriminatory terms ("RAND"), the patents they own that prove essential to implementing the standard. In his empirical study of patent policies among telecommunications and computer-networking SSOs as they stood in June 2002, Professor Lemley found that thirty-six of the forty-three SSOs (i.e., eighty-four percent) had written IP policies and that twenty-nine of the thirty-six written policies (i.e., eighty-one percent) required the SSO's participants to promise to license their patents on RAND terms.[12]

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9. As Professor Farrell explained more than fifteen years ago, "if technology used in a proposed standard is protected, as by patents or copyright, then its owner would benefit much more from the standard's adoption than would others." Joseph Farrell, *Standardization and Intellectual Property*, 30 JURIMETRICS J. 35, 43 (1989). As a result, "the more a standards body becomes an arena in which to fight over intellectual-property spoils, the less likely it is to reach rapid agreement on choosing the 'best' technology, or on any choice at all." *Id.*; *see also id.* at 44 ("strong intellectual property protection probably retards formal standardization because it increases vested interests"); Robert P. Feldman et al., *The Effect of Industry Standard Setting on Patent Licensing and Enforcement*, IEEE COMM. MAG., July 2000, at 112 ("The ideal of open, widely promulgated standards is at odds with a patent owner's right to exclude others from making, using, or selling the patented invention . . . [because this right] would serve to undermine rapid and widespread adoption of the standard, resulting in reduced value of the standard.").

10. *See* Lemley, *supra* note 7, at 1901-02 (describing this continuum of policies).

11. *Id.* at 1902.

12. *Id.* at 1904, 1906 & n.48. In this study, Professor Lemley "surveyed the rules and bylaws of forty-three different SSOs . . . to which companies in the telecommunications and computer-networking industries, where many of the most contentious IP issues arise, were likely to belong." *Id.* at 1903. The study's Appendix summarizes the IP policies of the different SSOs. *Id.* at 1973-80. A more recent empirical study of SSO patent policies observed a similar, albeit smaller, rate of RAND licensing: Of the fifty-nine SSOs the authors studied, thirty-six (i.e., sixty-one percent) had patent policies requiring, at a minimum, RAND licensing. Benjamin Chiao et al., *The Rules of Standard Setting Organizations: An Empirical Analysis*, *in* NEGOTIATION, ORGS. & MARKETS RES. PAPERS (Harvard NOM Research Paper No. 05-05), Feb. 9, 2005, at 26 tbl. 1, *available at* http://ssrn.com/abstract=664643.

Other students of voluntary standard setting have noted that SSOs most often condition participation on agreement to a RAND policy. *See, e.g.*, CARL F. CARGILL, OPEN SYSTEMS

Indeed, the RAND policy has become so popular that it has been incorporated into both copyright law[13] and federal procurement policy.[14] Most SSOs also require participants to disclose standard-pertinent patents and other intellectual property rights of which they are aware, although these requirements are far more varied in their details than the RAND policies.[15]

STANDARDIZATION: A BUSINESS APPROACH 31-32 (1997) [hereinafter CARGILL, OPEN SYSTEMS]; Carl Shapiro, *Navigating the Patent Thicket: Cross-Licenses, Patent Pools, and Standard Setting*, *in* INNOVATION POLICY AND THE ECONOMY 119, 128 (Adam Jaffe et al. eds., 2000), *available at* http://faculty.haas.berkeley.edu/shapiro/thicket.pdf; Michael G. Cowie & Joseph P. Lavelle, *Patents Covering Industry Standards: The Risks to Enforceability Due to Conduct Before Standard-Setting Organizations*, 30 AIPLA Q.J. 95, 100 (2002); Michael J. Schallop, *The IPR Paradox: Leveraging Intellectual Property Rights to Encourage Interoperability in the Network Computing Age*, 28 AIPLA Q.J. 195, 226-27 (2000).

13. *See* 17 U.S.C. § 512(i)(1)(B), (2)(A) & (B) (2000) (conditioning eligibility for safe harbors against copyright infringement liability on an Internet service provider's accommodation of "standard technical measures," and defining such measures as those which, *inter alia*, result from a "multi-industry standards process" *and* "are available to any person on reasonable and nondiscriminatory terms"). The statute does nothing to specify what constitutes "reasonable and nondiscriminatory terms" for purposes of § 512, and the three congressional committee reports on the Act are utterly silent on this point. *See* H.R. REP. NO. 105-796, at 72-76 (1998) (Conf. Rep.), *as reprinted in* 1998 U.S.C.C.A.N. at 639, 649-652 (relevant portion of section-by-section analysis); H.R. REP. NO. 105-551, pt. 2, at 49-66 (July 22, 1998) (same); H.R. REP. NO. 105-551, pt. 1, at 24-29 (1998) (same); S. REP. NO. 105-190, at 40-56 (1998) (same). There are, to date, no reported cases on what constitutes "reasonable and nondiscriminatory terms" for purposes of this copyright provision.

14. In Office of Management & Budget Circular A-119, entitled *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, OMB "directs [federal] agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical." OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES § 1 (1998), *available at* http://www.whitehouse.gov/omb/circulars/a119/a119.html. Specifically, "[a]ll federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical." *Id.* § 6. The Circular expressly defines "voluntary consensus standards" to include RAND licensing: "These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties." *Id.* at § 4(a).

15. According to Professor Lemley, "[t]he majority of SSOs that had a policy (twenty-four of thirty-six) imposed either an express or implied obligation that members disclose IP rights of which they are aware. . . . There was greater variation, however, with respect to what must be disclosed." Lemley, *supra* note 7, at 1904. He also notes that, although "SSOs are remarkably diverse in their IP rules," the RAND promise is a "notable example" of the fact that "there are specific terms that seem to have been widely adopted." *Id.* at 1954 & n.272.

What, then, does the promise to license on reasonable and nondiscriminatory terms mean in detail? This very question has absorbed the attention of several legal and economics commentators in the last few years.[16] This literature has quickly converged on three consensus points about the meaning of the RAND promise. First, the nondiscrimination part of the promise is straightforward, requiring that participants license similarly situated adopters on the same terms.[17] Perhaps most important, as Swanson & Baumol explore at length in their recent article on RAND licensing, an SSO participant who competes downstream with other adopters in the market for the standardized technology must treat its adopter-licensees no less favorably than it treats itself.[18] In other words, it should charge licensees what it "implicitly charges itself for use of the [intellectual] property."[19]

Second, when patent-owner participants negotiate royalty rates with adopters, "[r]easonable *should* mean the royalties that the patent holder could obtain in open, up-front competition with other technologies, not the royalties that the patent holder can extract once other participants are effectively locked in to use technology covered by the patent."[20] Patent law's default damages rule, which

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16. *See* SHAPIRO & VARIAN, *supra* note 2, at 199-200, 238, 241; Shapiro, *supra* note 12, at 128, 136; Cowie & Lavelle, *supra* note 12, at 140-50; James C. DeVellis, *Patenting Industry Standards: Balancing the Rights of Patent Holders With the Need for Industry-Wide Standards*, 31 AIPLA Q.J. 301, 346-48 (2003); Lemley, *supra* note 7, at 1912-18, 1923-27, 1948-57; Mark R. Patterson, *Inventions, Industry Standards, and Intellectual Property*, 17 BERKELEY TECH. L.J. 1043, 1056-73 (2002); Schallop, *supra* note 12, at 227; Swanson & Baumol, *supra* note 8, at 10-45; David J. Teece & Edward F. Sherry, *Standards Setting and Antitrust*, 87 MINN. L. REV. 1913, 1953-64 (2003); Robert M. Webb, *There Is a Better Way: It's Time to Overhaul the Model for Participation in Private Standard-Setting*, 12 J. INTELL. PROP. L. 163, 203-09 (2004).

A separate subliterature focuses on the patent disclosure obligations that SSOs impose on participants, as well as the antitrust analysis of those situations where a participant has arguably failed to adhere to a disclosure obligation. The leading sources are 2 HERBERT HOVENKAMP ET AL., IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 35.5b (2002); Cowie & Lavelle, *supra* note 12, at 103-40; and Janice M. Mueller, *Patent Misuse Through the Capture of Industry Standards*, 17 BERKELEY TECH. L.J. 623 (2002).

17. *See* Lemley, *supra* note 7, at 1913, 1965 & n.325; Patterson, *supra* note 16, at 1053. Of course, even as straightforward a requirement as treating like parties alike is not without some complications, as Professors Teece and Sherry explore at length. *See* Teece & Sherry, *supra* note 16, at 1960-64. *See also* Feldman et al., *supra* note 9, at 114-15 (discussing nondiscrimination term).

18. Swanson & Baumol, *supra* note 8, at 29.

19. *Id.* They present a framework for making explicit this implicit price to the patentee, adapting a concept from the regulated industries domain known as the efficient component pricing rule ("ECPR"), or the parity principle. *Id.* at 30-45. According to their analysis, "a royalty [should] be deemed 'nondiscriminatory' for RAND purposes when it satisfies ECPR conditions, which ensure that it is competitively neutral and offers no special advantages to any competitor in the final product market, *including the IP owner itself*." *Id.* at 57 (emphasis in original).

20. SHAPIRO & VARIAN, *supra* note 2, at 241 (emphasis in original). Swanson & Baumol

specifies that a patentee's damages will "in no event [be] less than a reasonable royalty for the use made of the invention by the infringer,"[21] has generated a large body of cases the courts can use to determine a reasonable royalty in the standard-setting context.[22] The consensus on these two points, at least, appears well founded.

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state, in similar terms, that "the concept of a 'reasonable' royalty for purposes of RAND licensing must be defined and implemented by reference to ex ante competition, i.e., competition in advance of standard selection." Swanson & Baumol, *supra* note 8, at 10-11. They propose that SSOs obtain this pre-selection competition by "conducting 'auctions' of their standards in which IP holders 'bid' for favorable standard selections through the submission of RAND commitments coupled with specifically disclosed 'model' or 'representative' licensing terms." *Id.* at 16.

Professor Patterson offers an additional account, consistent with Swanson & Baumol's later auction model, of a royalty attributable to the contributed technology's ex ante inherent technical advantages, but not to the fact of standardization itself. *See* Patterson, *supra* note 16, at 1056-73; Mark R. Patterson, *Antitrust and the Costs of Standard-Setting: A Comment on Teece & Sherry*, 87 MINN. L. REV. 1995 (2003) (elaborating further on his approach); *see also* Cowie & Lavelle, *supra* note 12, at 148; Daniel J. Gifford, *Developing Models for a Coherent Treatment of Standard-Setting Issues Under the Patent, Copyright, and Antitrust Laws*, 43 IDEA 331, 351 (2003); Lemley, *supra* note 7, at 1966-67 & n.332. In addition, two articles suggest that a reasonable royalty should be a low one in absolute terms. *See* Stanley M. Besen & Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, 8 J. ECON. PERSP. 117, 125 & n.12 (1994) (equating "acceptable terms" with "low-cost licensing," citing licenses of IBM and Unisys patents on proposed modem compression standard); Peter C. Grindley & David J. Teece, *Managing Intellectual Capital: Licensing and Cross-Licensing in Semiconductors and Electronics*, 39 CAL. MGMT. REV. 8, 20 (1997) ("Industry standards bodies sometimes require that patent holders agree to license their patents with low or zero royalty fees, often on a non-discriminatory basis. . . . The 'reasonable rate' royalty involved is likely to be low, though need not be zero.").

21. 35 U.S.C. § 284, ¶ 1 (2000).

22. *See* Cowie & Lavelle, *supra* note 12, at 140-41 (noting the relevance of the patent damages statute); Lemley, *supra* note 7, at 1914 & n.84 (same). "A reasonable royalty has been defined as 'an amount "which a person, desiring to manufacture and sell a patented article, as a business proposition, would be willing to pay as a royalty and yet be able to make and sell the patented article, in the market, at a reasonable profit."'" JANICE M. MUELLER, AN INTRODUCTION TO PATENT LAW 401 (2d ed. 2006) (quoting Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152, 1157-58 (6th Cir. 1978)). Moreover, "[i]n determining the countours of the hypothetical negotiation [about the reasonable royalty], district courts have traditionally considered evidence . . . on an extensive list of factors as set forth in the leading case of *Georgia-Pacific Corp. v. United States Plywood Corp.*" *Id.* at 402-03. Of the fifteen *Georgia-Pacific* factors, two factors seem especially adapted to take account of the peculiarities of the standard setting process: factors #9 ("The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results.") and #13 ("The portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer."). *See* Georgia-Pacific Corp. v. United States Plywood Corp., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (listing fifteen factors).

Third, there is a common refrain that the RAND promise's meaning is unclear to a troubling degree and that SSOs do too little to explain its meaning. For example, Professor Patterson, after noting that "the 'nondiscriminatory' element of [RAND] policies is straightforward," frets that "the definition of 'reasonable' is not so clear. Moreover, the standard-setting bodies themselves make little effort to define the term."[23] In a similar vein, Swanson & Baumol opine that "a RAND commitment is of limited value in the absence of objective benchmarks that make clear the concrete terms or range of terms that are deemed to be reasonable and nondiscriminatory."[24] From widespread comments such as these and others,[25] it appears well accepted in the literature that SSOs are doing less than they should to spell out the RAND promise's details. Indeed, one commentator goes so far as to argue that the seemingly vague RAND promise is a "tool for misuse" and that SSOs should thus be held to have violated the antitrust laws when they fail "to require, or at least affirmatively encourage, 'ex ante' disclosure of intended license terms prior to voting [to adopt a standard], with a related mechanism for collective negotiation of the license agreement."[26]

We should, however, reject the current consensus that the conventional RAND promise is materially underspecified. The consensus view mistakenly knocks as deficient a powerfully concise and effective means for restructuring the basic legal context within which SSO patent-holders and standard-adopters

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23. Patterson, *supra* note 16, at 1053.

24. Swanson & Baumol, *supra* note 8, at 5. What Swanson & Baumol appear to miss is the independent value that comes not from listing concrete terms or a range of terms, but rather from (re)structuring the property law context within which negotiation over the terms takes place. To indulge a sports analogy, some of the enabling value for a tennis game comes from the standard set of rules, and some comes from choosing to play on clay rather than on grass (or vice versa).

25. *See* Shapiro, *supra* note 12, at 128 ("Perversely, by leaving the precise licensing terms vague, this caution [about avoiding the appearance of an unlawful buyers' cartel] can in fact lead to ex post holdup by particular rights holders, contrary both to the goal of enabling innovation and to consumers' interests."); Cowie & Lavelle, *supra* note 12, at 100-01 ("[A]mong the questions that the SSO regulations frequently do not address [is] . . . What constitutes a 'reasonable' or 'nondiscriminatory' royalty?"); Lemley, *supra* note 7, at 1964-65 ("Virtually no SSO specifies the terms on which licenses must be granted beyond the vague requirement that they be 'reasonable' and 'nondiscriminatory.' Indeed, some SSOs expressly forbid discussion of such issues when a standard is under consideration, presumably for fear of antitrust liability. Further, private licenses are normally confidential. The result is uncertainty over the cost and scope of patent licenses that may not prove much better than having no policy at all.") (footnotes omitted); Schallop, *supra* note 12, at 227 ("the meaning of 'reasonable' and 'fair' is not entirely clear").

26. Robert A. Skitol, *Concerted Buying Power: Its Potential for Addressing the Patent Holdup Problem in Standard Setting*, 72 ANTITRUST L.J. 727, 728-29 (2005). Curran and Webb, in separate articles, also advocate that adopters be permitted to negotiate collectively for the license(s) they need to practice a standard. *See* Patrick D. Curran, Comment, *Standard-Setting Organizations: Patents, Price Fixing, and Per Se Legality*, 70 U. CHI. L. REV. 983, 1001-08 (2003); Webb, *supra* note 16, at 221-25. Unlike Skitol, however, neither argues that a SSO risks antitrust liability when it fails to help adopters bargain collectively for a license.

negotiate patent licenses. Admittedly, SSOs could doubtless make their IP policies, including the RAND promise, more detailed. For example, an SSO's RAND policy could expressly state that, in determining a reasonable royalty, the central question is the patented technology's ex ante technological value as determined by a pre-selection auction mechanism, rather than the technology's ex post coordination value. Nor do I doubt that such detail, were it added, could reduce uncertainty on some occasions to the mutual benefit of participants and adopters alike. However, though I myself once concluded that the RAND promise's meaning is badly underspecified, I now think that view is unsound.

We already know the RAND promise's core meaning, because we know its function. I conclude that by making this promise all the participants who own patents in the resulting standard grant the adopter community an irrevocable right to use its patented technology to comply with the standard in exchange for a reasonable royalty and other reasonable terms, the details of which are negotiated later without any possibility of a court injunction. The participants thus cast themselves into a common venture, creating the possibility for post-standardization, mutually beneficial bargaining over patent license terms by precluding both subsequent patent-based shutouts and holdups from threatened shutouts. Indeed, the details of the license that the parties later negotiate are quite minor compared to the paramount importance of establishing the patentee's inability to seek an injunction.[27]

The RAND promise locks in adopters' access with all the clarity that is needed to achieve this core function. In fact, the same commentators to which I have already referred strongly point the way to this very conclusion by repeatedly highlighting the central role of the RAND promise in preventing participant patent owners from obtaining injunctions against adopters.[28] What the existing literature has *not* done, and what this Article does, is put the core meaning of the RAND promise—an irrevocable waiver of injunctive relief and other extraordinary remedies—on a solid footing by showing that it is a transaction-cost-minimizing governance structure equivalent to the separate patent licensing corporation that sits at the center of the typical patent pool.

The fundamental clarity of the RAND promise in common use is no small point—at least, not for the lawyers. Professor Lemley's observation in 2002 regarding the RAND promise remains true today: "there has not been much in the way of judicial explication of this term so far."[29] The courts and the Federal Trade Commission have, however, ruled on disputes about a variety of SSO

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27. Where the parties cannot reach a license agreement, "[the] courts will determine what royalty is reasonable based on industry custom—here, the treatment of patents of similar scope in related industries," as they already do in conventional patent cases. Lemley, *supra* note 7, at 1914. The key difference from a conventional patent infringement case is that the reasonable royalty applies not only to past use of the patented technology but also to continued use after the suit ends (rather than being negotiated after suit, at the patentee's option, in the shadow of an actual injunction against further use of the patented technology).

28. *See infra* Part II.

29. Lemley, *supra* note 7, at 1954 n.272.

patent disclosure rules.[30] Perceived lack of clarity in an IP policy's terms played the decisive role in *Rambus Inc. v. Infineon Technologies, Inc.*,[31] the leading federal appellate court case that directly interprets and applies a SSO IP disclosure policy.[32] The Federal Circuit focused on gaps in the disclosure policy to explain its rejection of Infineon's claims that Rambus had committed fraud in the standard setting process at issue in the case:

> In this case there is *a staggering lack of defining details* in the EIA/JEDEC patent policy. When direct competitors participate in *an open standards committee*, their work *necessitates a written patent policy with clear guidance on the committee's intellectual property position*. A policy that does not define clearly what, when, how, and to whom the members must disclose does not provide a firm basis for the disclosure duty necessary for a fraud verdict. Without a clear policy, members form vaguely defined expectations as to what they believe the policy requires—whether the policy in fact so requires or not.[33]

The case focused on a disclosure policy, but it surely holds a lesson for RAND policies as well.

It seems inevitable that the courts will be called on to interpret and apply the RAND promise, whether the litigation begins as a patent infringement suit brought by a participant patent owner[34] or as an antitrust or other suit brought by an adopter.[35] Indeed, in a quite recent and intriguing development, wireless

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30. For a detailed discussion of these cases, see HOVENKAMP ET AL., *supra* note 16, § 35.5b; Mueller, *supra* note 16, at 653-69.

31. 318 F.3d 1081 (Fed. Cir. 2003).

32. For a concise review of the *Rambus* case, see David Alban, Note, Rambus v. Infineon: *Patent Disclosures in Standard-Setting Organizations*, 19 BERKELEY TECH. L.J. 309 (2004).

33. 318 F.3d at 1102 (emphasis added). My goal here is not to quarrel with the particular analysis or outcome in *Rambus*. Rather, it is simply to highlight the central role that perceived clarity is likely to play in any court review of the terms of a SSO's IP policy.

34. There has already been district court litigation of this sort. *See* Agere Sys. Guardian Corp. v. Proxim, Inc., 190 F. Supp. 2d 726 (D. Del. 2002); Townshend v. Rockwell Int'l Corp., 55 U.S.P.Q.2d (BNA) 1011 (N.D. Cal. 2000). Cowie & Lavelle conclude that "[i]n the near future it seems likely that the courts will begin to decide cases involving the interplay between standards commitments to license on a 'reasonable' basis and the requirements of 35 U.S.C. § 284," the basic patent damages statute. Cowie & Lavelle, *supra* note 12, at 148.

35. Again, there has already been district court litigation of this sort. *See* ESS Tech., Inc. v. PC-Tel, Inc., No. C-99-20292 RMW, 1999 WL 33520483, at *1 (N.D. Cal. Nov. 4, 1999). In July 2005, Broadcom Corp. sued Qualcomm Inc., alleging antitrust and other wrongs relating to Qualcomm's license terms for patents thought to be essential for complying with a wireless telephony standard. *See* Ashlee Vance, *Broadcom Finds an Antitrust Suit for Qualcomm*, THE REGISTER, July 5, 2005, *available at* http://www.theregister.co.uk/2005/07/05/broadcom_anti_qualcomm. A copy of Broadcom's complaint is available at http://www.broadcom.com/qualcomm_antitrust.pdf. Qualcomm has, as of March 2006, filed three patent infringement complaints against Broadcom. The third suit "concerns key patents for a high-speed wireless

handset maker Nokia Corp. has reportedly filed a Delaware state court suit against Qualcomm Inc., which licenses many patents essential to practicing wireless telephony standards.[36] Nokia filed the suit after Qualcomm sued Nokia for patent infringement in three different fora: U.S. District Court, England's High Court, and, most recently, the U.S. International Trade Commission.[37] According to its own press release about the suit, Nokia "is asking the Court to order Qualcomm to abide by its written contractual obligations to international [SSOs] to license intellectual property essential to" the telephony standards on RAND terms, *and*—most interestingly, in the context of this Article—"is seeking a Court order to affirm that Qualcomm is *not entitled to injunctive relief* in relation to alleged infringement of patents declared essential to a standard."[38] Nokia's request that the court declare injunctive relief to be out of bounds, based on Qualcomm's having undertaken the RAND promise, goes to the heart of what the RAND promise means. The prospect that a court may undermine the widely adopted RAND policy out of a mistaken sense that it is fatally unclear, thereby disrupting settled expectations among legions of standards adopters and sending ripples through both copyright law and federal procurement policy, is worrying indeed.

As a final preliminary matter, the RAND promise, embedded in SSO bylaws to which participants agree, is primarily a matter of contract law.[39] As a consequence, there is a sense in which one cannot interpret the RAND promise in the abstract; the individual wording of different policies could make a difference, depending on the particulars of a dispute. The popularity of the RAND promise suggests, however, that the policy embodies a core feature of the patent rights/standard setting interaction that is deeper than any particular policy's wording. My goal here is not to parse the wording of any particular policy nor to map the minutiae of a doctrinal pigeonhole in which to place a given license dispute about such a policy. Rather, I shall describe the RAND

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standard known as W-CDMA." Reuters, *Qualcomm Files Third Suit Against Broadcom*, clnet news.com, Mar. 29, 2006 (copy on file with author). Notably, "Qualcomm seeks an injunction against Broadcom . . . as well as monetary damages." *Id.*

36. *See* Nancy Gohring, *Nokia Files Complaint Against Qualcomm*, INFOWORLD, Aug. 9, 2006, http://www.infoworld.com/article/06/08/09/HNnokiasuesqualcomm_1.html.

37. *See* Nancy Gohring, *Qualcomm Files Patent Infringement Suit Against Nokia*, INFOWORLD, Nov. 7, 2005, http://www.infoworld.com/article/05/11/07/hnqualcommsuit_1.html (describing U.S. district court case); Nancy Gohring, *Qualcomm Sues Nokia in U.K.*, INFOWORLD, May 25, 2006, http://www.infoworld.com/article/06/05/25/78666_HNqualcommsuesnokia_1.html (describing High Court case); Dan Nystedt, *U.S. ITC Investigating Nokia Trade Practices*, INFOWORLD, July 11, 2006, http://www.infoworld.com/article/06/07/11/HNqualcommbannokia_1.html (describing ITC case).

38. Nokia Corp., *Nokia Asks Delaware Court to Enforce Qualcomm's Contractual Obligations in Essential Patent Licensing*, Aug. 9, 2006, http://www.nokia.com/A4136001?newsid=1068193 (emphasis added).

39. *See* Lemley, *supra* note 7, at 1909-18 (analyzing the enforceability of SSO IP policies as contracts). It is also a matter of property law because it is a contract about a property right.

promise's core enabling function for standard setting and to give an account of its theoretical underpinnings that should animate a court's reasoning in a suit about a RAND promise. It is thus sufficient to illustrate the RAND promise with a popular model policy—namely, the patent policy of the American National Standards Institute ("ANSI").

ANSI, an umbrella organization founded in 1918 that accredits SSOs in the United States, has fostered voluntary industry standard setting and established model SSO policies.[40] The basic patent policy for ANSI-accredited SSOs states that "[t]here is no objection in principle to drafting a proposed American National Standard in terms that include the use of a patented item, if it is considered that technical reasons justify this approach."[41] With regard to adopters' access to the technology covered by a standard-essential patent, the policy triggers a demand for a written statement from the patent holder whenever there is "notice that a proposed American National Standard may require the use of a patented invention."[42] The written statement requirement provides as follows:

> **3.1.1 Statement from patent holder**
> Prior to approval of such a proposed American National Standard, the Institute shall receive from the identified party or patent holder (in a form approved by the Institute) either: assurance in the form of a general disclaimer to the effect that such party does not hold and does not currently intend holding any invention the use of which would be required for compliance with the proposed American National Standard or *assurance that*:
>
> a) a license will be made available without compensation to the applicants desiring to utilize the license for the purpose of implementing

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40. *See* Shapiro, *supra* note 1, at 86. ANSI provides information about its history at http://ansi.org/about_ansi/introductino/history.aspx?menuid=1. For an ICT industry expert's perspective on ANSI's history and accomplishments, see CARGILL, OPEN SYSTEMS, *supra* note 12, at 242-49. Because ANSI's standard-setting model is highly formalized, *id.*, one might suspect that its IP policy is not representative of the approach taken by less formal industry consortia, i.e., "collection[s] of like minded companies who are devoted to doing something using the same basic technology . . . [and] believe that, if they could get a common technology out, they could all compete using this common technology." *Id.* at 125. On the RAND licensing point, however, the most formal SSOs and less formal consortia appear to occupy common ground. For example, the Internet Engineering Task Force ("IETF") consortium is the most important SSO for the Internet. *See id.* at 256-61 (describing IETF's work). Its RAND policy, which I describe in a brief appendix to this Article, *infra*, is quite close to that of ANSI.

41. AMERICAN NATIONAL STANDARDS INSTITUTE, ANSI ESSENTIAL REQUIREMENTS: DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS 9, ¶ 3.1 (Jan. 31, 2006), *available at* http://public.ansi.org/ansionline/Documents (follow "Standards Activities" hyperlink; then follow "American National Standards" hyperlink; then follow "Procedures, Guides, and Forms" hyperlink) [hereinafter ANSI ESSENTIAL REQUIREMENTS].

42. *Id.*

the standard; or

b) *a license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.*[43]

In addition, ANSI retains a record of this written statement,[44] and the published standard itself is required to notify adopters that "compliance with th[e] standard may require use of an invention covered by patent rights."[45] As ANSI's then-General Counsel, Ms. Amy Marasco, explained, "[i]f the patent holder submits a patent statement to the effect of either (a) or (b) [of ¶ 3.1.1 of the ANSI patent policy], this creates third-party beneficiary rights in implementers of the standard."[46]

Thus, by adopting a RAND policy such as ANSI's, SSO participants (who will also be adopters, in need of access to standard-essential patents) grant an irrevocable, property-like use right to all adopters. Put another way, they contract out of an injunction-backed property rule, and into a reasonable-royalty liability rule.[47] The adopters' locked-in access right, rather than the patent

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43. *Id.* ¶ 3.1.1 (emphasis added).

44. *Id.* ¶ 3.1.2.

45. *Id.* ¶ 3.1.3.

46. Amy A. Marasco & Elizabeth Dodson, *Invention and Innovation: Protecting Intellectual Property in Standards-Setting*, 2 J. IT STANDARDS & STANDARDIZATION RESEARCH 49, 50 (2004); *see also id.* at 57 (noting that Marasco was, at that time, ANSI's General Counsel). In his empirical study, which predates Marasco's article by two years, Professor Lemley expresses guarded support for the third-party beneficiary theory. *See* Lemley, *supra* note 7, at 1914-15. In addition to the then-existing trial court decision he notes, *id.* at n.88, another trial court has since concluded that a standard adopter can use a third-party beneficiary theory to enforce a SSO's IP policy. *See* Agere Sys. Guardian Corp. v. Proxim, Inc., 190 F. Supp. 2d 726, 738 (D. Del. 2002) (granting the adopter leave to amend its answer and counterclaims to include a breach of contract count, on third-party beneficiary grounds).

47. The *locus classicus*, at least in intellectual property law, is Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996) [hereinafter Merges, *Contracting*]. Professor Merges shows that patentees have used patent pools as a form of private ordering to clear mutually blocking patent portfolios that would otherwise halt commercialization in a valuable market space. *Id.* at 1340-58; *see also* Robert P. Merges, *Institutions for Intellectual Property Transactions: The Case of Patent Pools*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 123, 146-54 (Rochelle Cooper Dreyfuss et al. eds., 2001) [hereinafter Merges, *Institutions*] (discussing the MPEG-2 and DVD pools). More recently, Merges has briefly noted the similar institutional function of patent pools and SSOs. *See* Robert P. Merges, *From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation* 4, 18-19 (Conference on the Legal History of Intellectual Property, University of Wisconsin Law School Institute for Legal Studies, Nov. 13, 2004), *available at* http://ssrn.com/abstract=661543. Professor Lemley, for his part, lauds SSOs as another form of private ordering, but in doing so stresses what he sees as "important differences between SSOs and

owner's traditional right to obtain a court injunction against unauthorized use,[48] frames all subsequent license negotiations. In this respect, the structure-changing words "a license *will* be made available" play a more fundamental role than the substantive words "reasonable terms and conditions that are demonstrably free of any unfair discrimination,"[49] on which most current analyses focus.

Part I of this Article highlights both the features of voluntary standard setting that drive the meaning of the RAND promise and the conventional backdrop for negotiating a patent license that the RAND promise is designed to displace. Part II shows that most who have analyzed the RAND promise's meaning expressly describe it as a mechanism that should prevent a participant-patentee from using an injunction threat to hold up the adopter community for disproportionate royalty payments. Part III first provides a brief discussion of the pertinent transaction cost economics literature, then shows how the corporate form generally and patent pool central licensing companies more specifically are the access lock-in institutions to which the RAND promise is functionally equivalent. Part III also offers some suggestions about the new challenges SSOs likely face in realizing the RAND promise.

I. STANDARD SETTING AND DEFAULT PATENT RULES

SSOs tackle a wide variety of technology problems, even within the limits of the ICT sectors. The details of the standard setting process vary somewhat from group to group and from technology to technology. There are many resources describing the standard-setting process generally, detailing many groups' processes and particular standards outputs.[50] It is not necessary, however, to rehearse a host of such details here. Instead, it suffices to review a small number of key facts about both the typical standard-setting context and patent law's default rules favoring injunctive relief (which ill fit voluntary standard setting).

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patent pools." Lemley, *supra* note 7, at 1951, 1951-54 (describing these differences). One goal of this Article is to show that the RAND promise serves the same function as a patent pool's central licensing entity, thereby making the similarities between SSOs and pools far more important than the differences.

48. *See* 35 U.S.C. § 283 (2000) ("The several courts having jurisdiction of cases under [the Patent Act] may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."); Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1247 (Fed. Cir. 1989) ("It is the general rule that an injunction will issue when infringement has been adjudged, absent a sound reason for denying it.").

49. ANSI ESSENTIAL REQUIREMENTS, *supra* note 41, ¶ 3.1.1.

50. The interested reader should begin with CARGILL, OPEN SYSTEMS, *supra* note 12; CARL F. CARGILL, INFORMATION TECHNOLOGY STANDARDIZATION: THEORY, PROCESS, AND ORGANIZATION (1989) [hereinafter CARGILL, INFORMATION TECHNOLOGY]; MARTIN LIBICKI ET AL., SCAFFOLDING THE NEW WEB: STANDARDS AND STANDARDS POLICY FOR THE DIGITAL ECONOMY (2000); SHAPIRO & VARIAN, *supra* note 2, at chs. 7 & 8; and STANDARDS POLICY FOR INFORMATION INFRASTRUCTURE (Brian Kahin & Janet Abbate eds., 1995).

A. The Typical Standard Setting Context

Contemporary standard setting is a technical process undertaken for a business end. The space for group-set *de jure* standards exists only where a single firm cannot supply a single solution to the market and thereby establish a *de facto* standard.[51] "A corporation will accept and use standards only if it believes that it cannot control the market directly and that standards can."[52] The goal of ICT compatibility standardization is thus plural supply of a single interface, i.e., different parts made by different producers working together to accomplish the consumer's desired results. When this need arises for a set of specifications to which different producers can conform, an SSO can pick up the task as a new standardization project (or interested producers can form a new SSO). The typical scenario, of interest here, is anticipatory standard setting that enables an emerging technology,[53] for "history proves that the consensus process of formal standard setting is time and again critical to launching new technologies."[54]

The typical SSO, the workhorse of the standard setting process, comprises two parts: the administrative management part, and the working group(s) part.[55] The working group is the basic unit that meets collaboratively to draft a written specification embodying a standard.[56] The working group is peopled with volunteers from the interested firms (and sometimes from government agencies and academic departments) who are technical, not legal or business, experts.[57]

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51. The space for group-set standards is necessary, but not sufficient, for their creation. Firms may, of course, choose to battle in the marketplace to become the *de facto* standard. For discussion of historical examples and business strategies, see PETER GRINDLEY, STANDARDS STRATEGY AND POLICY: CASES AND STORIES (1995) and SHAPIRO & VARIAN, *supra* note 2, at ch. 9 (entitled "Waging a Standards War"). My focus here is on the firms that have chosen to work with others to create a standard. How firms choose between market battle or collaborative standard setting is beyond the scope of this Article.

52. CARGILL, INFORMATION TECHNOLOGY, *supra* note 50, at 42.

53. *See id.* at 45 ("[T]he IT industry is moving, in many cases, to standards that anticipate the actual creation of a product and are used to define a market . . . ."); SHAPIRO & VARIAN, *supra* note 2, at 236 ("Companies developing new technology *collectively* tend to welcome standards, because standards typically expand the total size of the market and may even by vital for the emergence of the market in the first place."); Skitol, *supra* note 26, at 735-36 ("[T]he essence of information technology (IT) standard setting in many contexts today is joint development of new technologies necessary to the creation and growth of new markets and the related necessity for interoperability among new products . . . .").

54. SHAPIRO & VARIAN, *supra* note 2, at 237.

55. *See* CARGILL, OPEN SYSTEMS, *supra* note 12, at 118-19.

56. *Id.*

57. *See id.* at 123; Lemley, *supra* note 7, at 1907 ("A company's representative to such an SSO is normally an engineer with little or no understanding of patent law."); Marasco & Dodson, *supra* note 46, at 50 ("The standards-setting participants are often technical experts who do not

These volunteers, as technical experts, each contribute technology ideas to the process from which a final specification emerges.[58] If it is to succeed, the standard-setting process entails evaluating a participant's contributions and suggestions primarily on their technical, practical merit (including cost-effectiveness), rather than on the identity of the firm she represents in the standard-setting process. "[S]tandards developers understand that they are participating in an activity that may transcend individual or corporate needs and goals. If the participants are involved only to espouse their own causes, at the expense of the common good, the system will not work."[59]

The common good at which the working group aims—a detailed specification embodying an interface standard that separate firms can use to grow the market for the standardized product—is unknown at the start of the process.[60] Most importantly, at the start, participants do not know which sponsoring firms will turn out to have contributed the technologies essential to the standard, or which of the essential technologies, if any, are covered by patents owned by the sponsoring firms. Each participant thus sees that, at the end of the process, its sponsoring firm is as likely to require one or more patent licenses from other sponsoring firms as it is to own a patent that all adopters require. Indeed, the process could easily result in a situation where multiple participants hold multiple patents on small, interlocking pieces of the standard. Whatever the final outcome, participants make the RAND promise behind a veil of ignorance about their ultimate status as patentees or licensees.[61]

The only thing the sponsoring companies know for certain is that once the standard's selection ushers in a new network technology by setting the interface specifications, "these same companies [will] shift gears and compete head to head for their share of that network."[62] Indeed, the competitively driven

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have legal or business responsibilities with regard to licensing issues."). The fact that it is frontline, technical SSO participants who undertake the RAND promise, rather than intellectual property lawyers or business licensing experts, should not interfere with a court's construing the RAND promise according to its intended function. Just as two tradespeople can agree on the legally definitive terms of a service contract without legal expertise, so too can engineers agree with a SSO to make standard-essential patents available to all future adopters on RAND terms without legal expertise. *But cf.* Lemley, *supra* note 7, at 1956 ("IP rules have largely been an afterthought for most SSOs. SSOs are made up of engineers who want to pick the right technical standard, not lawyers who want to clear rights. . . . SSO IP rules . . . are often put together without much participation by lawyers, and without much thought to the sorts of disputes that might arise.").

58. *See* CARGILL, INFORMATION TECHNOLOGY, *supra* note 50, at 43 (explaining that the standard-setting process "is based on the belief that all parties can and will contribute something").

59. CARGILL, OPEN SYSTEMS, *supra* note 12, at 163.

60. *Id.* at 124 ("When a working group begins its creative function, there is no guarantee as to what will emerge from the standards process: The common good is a complete unknown.").

61. *See* HOVENKAMP ET AL., *supra* note 16, § 35.6c3, page 35-54.2 (describing this "veil of ignorance").

62. SHAPIRO & VARIAN, *supra* note 2, at 228; *see also* Gifford, *supra* note 20, at 357 (stating that when "producing firms agree on compatibility, they remain free to compete fiercely on

diffusion of interoperable technologies is among the central benefits consumers enjoy from industry adoption of accessible standards.[63]

The jockeying for competitive advantage has foreseeable consequences for patent licensing. Patent license disputes from outside the SSO context suggest that if participants were to wait until after the standard were set before working out any license terms those who turned out to own essential patents could hold up patentless adopters for a disproportionate share of the standardized technology's substantial coordination value.[64] The holdup plays on a gap in projected returns that depends on continued access to the standardized technology: once the standard is set, users invest in making goods and services that use the specification. If a user were then denied access to the standard technology and the standard-compliant assets were sold at salvage value, the return on those investments would be far lower than first projected (when continued access was assumed). After all, if other providers enjoy continued access to the standard and the interface-dependent market thrives, how much will consumers pay for the shut-out party's nonstandard product? This scenario is not unique to the standards setting context. Economists have long called the problem "asset specificity."[65] The RAND promise, which is an early agreement on the

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everything else: the quality of their products, their features, and their prices").

63. *See* Swanson & Baumol, *supra* note 8, at 3 ("[S]tandards and associated technical specifications can facilitate entry and competition by promoting substitutability and interoperability of products and processes and by intensifying 'intra-standard' rivalry.").

64. *See* Shapiro, *supra* note 12, at 124-26 (describing such patent license holdups); Swanson & Baumol, *supra* note 8, at 9-10, 19-20 (same). I say *disproportionate* share because "the 'true' or underlying value of [the licensor's] intellectual property . . . is normally best measured by adopters' willingness to pay for it when they know their alternatives and *have not yet made investments specific to that technology*." Joseph Farrell & Carl Shapiro, *Intellectual Property, Competition, and Information Technology*, *in* THE ECONOMICS OF INFORMATION TECHNOLOGY: AN INTRODUCTION 49, 81 (Hal R. Varian ed., 2004) (emphasis added). Of course, adopters with essential patents of their own may be able to obtain royalty-free cross-licenses. *See* Lemley, *supra* note 7, at 1949 (discussing royalty-free cross-licensing).

In a recent paper, Professors Lemley and Shapiro offer a model for the holdup and royalty stacking problems that beset patent licensing where the market product embodies many separately patented inventions. As they note, "[i]n the information technology sector in particular, modern products such as microprocessors, cell phones, or memory devices can easily be covered by dozens or even hundreds of different patents." Mark A. Lemley & Carl Shapiro, *Patent Holdup & Royalty Stacking* 1 (Stanford Law and Economics Olin Working Paper No. 324, 2006), *available at* http://ssrn.com/abstract=923468. Interestingly, their detailed examples of royalty stacking problems pertain to standardized technology—third generation wireless telephony, and wireless local area networking. *Id.* at 25-27.

65. The *locus classicus*, at least in law, is Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978). As Professor Paul Joskow summarizes,

> [r]elationship-specific investments are investments which, once made, have a value in alternative uses that is less than the value in the use originally intended to support a

framework for later negotiation, is timed to take advantage of the tempering effect of the veil of ignorance[66] and is designed to prevent this holdup problem.[67]

Given the risk of holdup, it is natural for an outsider to wonder why SSOs insist merely that each participant promise to license all adopters on reasonable terms later rather than insisting that participants negotiate detailed license terms with the adopter community before a standard is finalized. There are two main reasons, one legal and one practical. First, assuming it were possible for participants to hammer out detailed license terms before the standard is determined, the prospect of antitrust liability deters a SSO from being a forum for adopters to bargain as a group with participant patentees. As ANSI's General Counsel observed, "discussing licensing issues may impose a risk that the [SSO] and the participants will become targets of allegations of improper antitrust conduct."[68] SSOs fear liability for acting, in effect, as a buyers' cartel that artificially suppresses the price that a patentee can command for access to its technology.[69]

> specific trading relationship. Once specific investments have been made a potential "hold-up" or "opportunism" situation is created if the parties can bargain over the ex post quasi rents (the difference in asset values between the intended and next best use) created by specific investments.

Paul L. Joskow, *Asset Specificity and Vertical Integration*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 107, 108 (Peter Newman ed., 1998). Unfettered haggling over appropriate patent royalties for continued access to standardized technology, if it takes place after the market built on the standard has been launched, threatens just this sort of holdup.

66. Professor Vermeule, examining constitutional law, describes a "veil of ignorance rule" as "a rule that suppresses self-interested behavior on the part of decisionmakers . . . by subjecting the decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision." Adrian Vermeule, Essay, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001). The RAND promise subjects SSO participants to just this sort of uncertainty about future benefits and burdens, with the intended effect. *See* Lemley, *supra* note 7, at 1951 ("SSOs tend to set a uniform IP policy and apply it across the board . . ." and "[b]ecause the members of the SSO generally don't know in advance whether they will be the owner or the licensee of any particular IP right, the policy is more likely to be drafted evenhandedly."). Moreover, even those commentators who conclude that the RAND promise does not adequately constrain patent owners recognize ex ante bargaining's tempering effect. *See* Skitol, *supra* note 26, at 734; Webb, *supra* note 16, at 221.

67. Shapiro, *supra* note 12, at 128, 136; Lemley, *supra* note 7, at 1895 (stating that the "promise" of SSO IP policies is to "solv[e] patent holdup problems"); *id.* at 1952 ("Bargaining under the veil of ignorance is particularly likely to solve holdup problems in which society as a whole would benefit from a deal, but once property entitlements are distributed those who receive them have an incentive to 'hold up' others for a disproportionate share of the returns.").

68. Marasco & Dodson, *supra* note 46, at 50.

69. *See* HOVENKAMP ET AL., *supra* note 16, § 35.6b; Shapiro, *supra* note 12, at 128 ("[M]any [SSOs] are wary of sanctioning any specific agreement regarding the magnitude of licensing terms for fear of antitrust liability, as such agreements might be construed as 'price-fixing.'"); Cowie & Lavelle, *supra* note 12, at 102 ("SSOs have been reluctant to specify or become involved in setting

Second, it is *not* possible to specify in advance a set of detailed, tailored

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royalty rates for patented technology for fear that they will be accused of price fixing or another violation of the antitrust laws.").

Several commentators, while acknowledging this widely held fear, argue that SSOs *should* be able to negotiate detailed license terms (such as precise royalty rates) with patent owners on behalf of adopters, without fear of antitrust liability. *See* Curran, *supra* note 26, at 994 (acknowledging current fear); *id.* at 1001-08 (arguing for per se legality of collective license negotiations); Patterson, *supra* note 16, at 1053 n.41 (acknowledging current fear); *id.* at 1078-80 (arguing for collective license negotiations); Skitol, *supra* note 26, at 729 (acknowledging current fear); *id.* at 735-42 (arguing that current fear is based on erroneous view of antitrust law). Interestingly, in a September 2005 address to a standard setting policy conference at Stanford University, Federal Trade Commission Chair Deborah Platt Majoras signaled greater openness to such ex ante license negotiations. According to Majoras,

> joint ex ante royalty discussions that are reasonably necessary to avoid hold up do not warrant per se condemnation. Rather, they merit the balancing undertaken in a rule of reason review. We would apply the rule of reason to joint ex ante royalty discussions because, quite simply, they can be a sensible way of preventing hold up, which can itself be anticompetitive. Put another way, transparency on price can increase competition among rival technologies striving for incorporation into the standard at issue. They may allow the "buyers" (the potential licensees in the standard-setting group) to get a competitive price from the "sellers" (the rival patentees vying to be incorporated into the standard that the group is adopting) before lock in ends the competition for the standard and potentially confers market power on the holder of the chosen technology. . . . If joint ex ante royalty discussions succeed in staving off hold up, we can generally expect lower royalty rates to lead to lower marginal costs for the standardized product and lower consumer prices.

Deborah Platt Majoras, Chair, Fed. Trade Comm'n, Remarks at Standardization and the Law: Developing the Golden Mean for Global Trade: Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting 7-8 (Sept. 23, 2005), *available at* http://www.ftc.gov/speeches/majoras/050923stanford.pdf. *See also* R. Hewitt Pate, Assistant Attorney General for Antitrust Division, U.S. Dep't of Justice, 2005 EU Competition Workshop: Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust 9 (June 3, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/209359.pdf ("It would be a strange result if antitrust policy is being used to prevent price competition. There is a possibility of anticompetitive effects from ex ante license fee negotiations, but it seems only reasonable to balance that concern against the inefficiencies of ex post negotiations and licensing hold up."). Following up on Commissioner Majoras's speech, and positing that even "[t]he mere possibility of an antitrust challenge, even under the rule of reason standard, inhibits many SSOs from allowing most forms of ex ante royalty communications," Kelly and Prywes urge that the antitrust enforcement agencies should create safe harbors for at least some ex ante royalty communications. John J. Kelly & Daniel I. Prywes, *A Safety Zone for the Ex Ante Communication of Licensing Terms at Standard-Setting Organizations*, ANTITRUST SOURCE, March 2006, at 5, 7-11. In any event, to interpret the RAND promise, one need not decide whether SSOs are right to fear antitrust liability in these circumstances, or whether we should change the antitrust laws clearly to permit ex ante license negotiations.

license terms for standard-essential patents. Frontline workgroup participants are not equipped to engage meaningfully with the details of licensing deals that will shape the market for the interface: "individuals who participate in standard setting are, for the most part, engineers unschooled in business considerations and unequipped to address the costs and related competitive implications of their technical specification-writing exercises."[70] And even if they *were* expert in business and licensing details, SSO participants would *still* face data gaps that render highly detailed ex ante negotiations nearly impossible.

Some of the gaps would relate to the existence of patents. For example, before the standard is established, it is unclear which if any of the participants will own standard-essential patents. This uncertainty is compound, comprising questions about both whose technology the standard will incorporate and whether the contributor in question owns a patent covering that technology.[71] Once all essential patents come to light, negotiations may take into account each patent's centrality to the standardized technology, relative to all the other essential patents.

Other gaps would relate to the future market for products that include that standardized interface. What unstandardized products will discipline the price of standardized products early in the product cycle, and how will that change as more people adopt the standardized product? What plans, if any, should be made for adjustable license terms that take account of dramatic price changes in the market, and what should the adjustment formulae be?[72] Calibrated royalty rates should take account of the answers to these and myriad other patent and market questions, but most of the answers will not be known (or known in sufficient detail) until after the SSO has established the standard and producers have begun selling standardized products. Ex ante licensing is thus likely to take place only at a general level, e.g., with short terms sheets that foreswear royalties above a

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70. Skitol, *supra* note 26, at 734.

71. If the contributor seeks a patent at around the same time as the standard-setting process takes place, it may be years before the patent issues and the precise scope of its coverage is clear. *See infra* note 78 (discussing typical time lag in patent issuance and changes in claim scope during patent prosecution). It seems likely that many patents will be sought during or after standard setting, if only because anticipatory standards are likely to pull in contributions at the forward edge of each participant's technology development process.

72. In the *ESS* case, for example, one of the reasons alleged to explain the unreasonableness of the patentee's royalty demand was a significant change in modem chipset price from 1996 to 1998. According to the plaintiff adopter ESS,

> while the proposed royalty payments may have been appropriate when chipsets sold for approximately $50 per unit [in 1996], chipsets were selling for approximately $10 per unit by March 1998 . . . [and] due to the changed modem market, the proposed royalty payments were unreasonably expensive and did not allow for new market entrants to compete with existing market participants.

ESS Tech., Inc. v. PC-Tel, Inc., No. C-99-20292 RMW, 1999 WL 33520483, at *1 (N.D. Cal. Nov. 4, 1999).

benchmarked cap.[73]

It is folly to expect, much less insist upon, ex ante negotiation of detailed, tailored license terms much beyond the royalty-free and RAND options.[74] Against this backdrop, the RAND promise's mandate that license terms be "reasonable" is not needlessly vague. Rather, it is appropriately open-textured, given that participants in the standard-setting process do not yet know the contours of the standard that will emerge, or how the as-yet-unknown patents essential to the standard should be valued in the standard-based market that develops. As Professor Lemley notes, "parties need not specify a price in order to create a binding agreement. In the absence of a price, courts will supply a reasonable and customary price term," and other reasonable terms as well.[75]

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73. As Swanon & Baumol note, such ex ante competition in license terms is likely to drive royalties down to the patentee's incremental cost of maintaining a license program, at least where the competing technologies offer similar production cost profiles. *See* Swanson & Baumol, *supra* note 8, at 16, 19. The standard setting arm of the Institute of Electrical and Electronics Engineers ("IEEE"), known as the IEEE Standards Association, *see* http://standards.ieee.org/, is considering a set of proposed rule changes to permit more ex ante discussion of RAND terms. *See* Jeffery B. Fromm & Robert A. Skitol, *Update on the Antitrust Ghost in the Standard-Setting Machine*, 5 IEEE MICRO 77, 77-78 (2005) (describing proposed rules changes). This additional discussion would take place at a general level: first, the patentee "would commit to licensing that is either royalty-free or RAND and, if RAND, would be encouraged (though not required) to state the maximum royalty rate"; and second, a patentee "who provide[s] the RAND commitment would be encouraged (though not required) to attach a sample license agreement." *Id.* at 78.

74. On this point, I strongly differ with those who urge that SSO participants can establish detailed license terms for standard-essential patents before the details of the standard itself are known. *See, e.g.*, Curran, *supra* note 26, at 984 (proposing "[a] rule of antitrust per se legality for single-source patent price bargaining [that] would permit SSOs to bargain with patent owners over the price of patent licenses before adopting patented technologies as industry standards"); Skitol, *supra* note 26, at 729 ("A much more sensible and effective approach [than requiring RAND terms] would be for the SSO to require, or at least affirmatively encourage, 'ex ante' disclosure of intended license terms prior to voting . . . ."); Webb, *supra* note 16, at 221 (proposing "the requirement that the participants in a standard-setting process negotiate a detailed license before the standard-setting deliberations begin"). If the price that adopters are asked to pay for patent access is to have any connection to the prices the market later sets for standard-compliant products, the access price cannot be set in advance at anything other than a price which is reasonable that will be decided with greater accuracy later. The license price term that *is* available in advance of determining the standard's details is $0, or some incremental cost of licensing that is close to $0. It is not surprising, then, that $0 and "reasonable royalty" are the price terms that most SSOs use. *See* Lemley, *supra* note 7, at 1906. For additional structural terms that could facilitate post-standardization license negotiations, see *infra* note 111 (describing suggestions from Professor Lemley).

75. Lemley, *supra* 7 note, at 1914 (citing E. ALLAN FARNSWORTH, CONTRACTS § 7.17 (2d ed. 1990)).

B. Default Patent Rules

The typical SSO's openness goals are difficult to square with patent law's tilt toward injunctive relief that protects the patentee's power to exclude others. This pro-injunction tilt is the norm in the shadow of which standards adopters must bargain with patentees for standard-essential patent licenses, unless the parties have taken themselves out of this shadow by making the RAND promise or by some other means. Brief reflection on patent law's injunction rules, especially the preliminary injunction rules, is adequate to show that the RAND promise is calculated to displace them.

Assume an adopter has been selling an item that implements a standard, and that this adopter and a participant patentee are unable to reach negotiated terms for a standard-essential patent. Any suit between the adopter and the patentee over the license terms will entail considering the adopter's liability for patent infringement.[76] The gravamen of the patentee's claim will be that the adopter, by making and selling the standard-compliant good or service, directly infringes the essential patent in question in violation of section 271 of the Patent Act.[77]

In the typical case, the adopter will find it difficult to deny infringement. First, if the patentee has done a competent job drafting the formal patent claim that corresponds to the standard-essential technology, the close correspondence between the patent right and the standard will be easy to establish. Indeed, it will often be the case that the formal patent claim was drafted *after* the standard was codified by the SSO, making it virtually certain that the claim will correspond tightly to the standard's terms.[78] Second, the adopter will likely have stated, in its marketing materials, that the good or service accused of infringement complies with the standard. Perhaps there is even a certification program for the standard to support those marketing statements.[79] In light of such marketplace

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76. *See supra* notes 34-35.

77. 35 U.S.C. § 271(a) (2000) ("[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.").

78. The typical patent application takes about 2.5 years to issue from the Patent Office. *See* Mark A. Lemley & Kimberly A. Moore, *Ending Abuse of Patent Continuations*, 84 B.U. L. REV. 63, 64, 71 (2004) (reporting results of a study of Patent Office prosecution time for all patents issued from 1976 through 2000). During this process, the applicant and the Patent Office engage in a back-and-forth process to finalize the text of the formal claims that the patent will contain. *See id.* at 76-79 (describing this process). "The Federal Circuit has made it clear that the law permits the drafting of claims written during prosecution specifically in order to cover a competitor's products," so long as "the patentee can find some support in the original patent application for the current claims." *Id.* at 77; *see also* Liebel-Flarsheim Co. v. Medrad, Inc., 358 F.3d 898, 909 n.2 (Fed. Cir. 2004) (approving the practice). Just as they can draft claims to cover specific products, patentees can draft claims to cover specific standards.

79. For example, the Wi-Fi Alliance, a "non-profit industry association of more than 275 member companies devoted to promoting the growth of wireless Local Area Networks (WLANs)," administers "testing and certification programs [to] ensure the interoperability of WLAN products

statements (which the patent infringement jury will definitely hear about), the adopter can hardly deny that it complies with the standard. An adopter accused of infringing a standard-essential patent will also find it difficult, as many accused infringers do, to prove that the patent claim is invalid or unenforceable and thus of no legal consequence. Each claim in an issued patent enjoys a presumption of validity,[80] and, in a full-blown patent trial, the patent challenger must prove both invalidity and unenforceability using a "clear and convincing" standard.[81] At the preliminary injunction stage, the patent challenger can carry its burden on invalidity and unenforceability a little more easily by raising a substantial question about the patent's validity that the patentee is unable to dispel before trial.[82] Even so, the deck is stacked in the patentee's favor.

The adopter's weak noninfringement and invalidity positions make it likely that the patentee can obtain a *preliminary* injunction against the adopter's continued use of the standard-essential technology. Under current doctrine,[83] once that patentee has demonstrated a strong showing of likelihood of success on the merits of its infringement claim (taking due account of any substantial defenses the accused infringer has raised) irreparable harm against the patentee is presumed and a preliminary injunction is likely to issue.[84] Importantly,

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based on the IEEE 802.11 specification." Press Release, WiFi.org, Wi-Fi Alliance to Certify Pre-Standard IEEE 802.11n Products Next Year (Aug. 29, 2006), http://www.wi-fi.org/OpenSection/news/pressrelease-082906-80211n/en/. According to the WiFi Alliance website, "[s]ince the introduction of the Wi-Fi Alliance's certification program in March 2000, more than 3000 products have been designated as Wi-Fi CERTIFIED™, encouraging the expanded use of Wi-Fi products and services across the consumer and enterprise markets." *Id.* Someone who markets a product as "WiFi certified" will have trouble credibly arguing that the product fails to comply with IEEE's 802.11 specification.

80. 35 U.S.C. § 282 (2000) ("A patent shall be presumed valid. Each claim of a patent . . . shall be presumed valid independently of the validity of other claims . . . .").

81. *See, e.g.*, Unitherm Food Sys., Inc. v. Swift-Ekrich, Inc., 375 F.3d 1341, 1349 (Fed. Cir. 2004), *rev'd*, 126 S. Ct. 280 (2006) (applying this standard of proof).

82. *See, e.g.*, Amazon.com, Inc. v. Barnesandnoble.com, Inc., 239 F.3d 1343, 1350-51 (Fed. Cir. 2001) (reversing the grant of preliminary injunction in the patentee's favor); New England Braiding Co. v. A.W. Chesterton Co., 970 F.2d 878, 882 (Fed. Cir. 1992); Nutrition 21 v. United States, 930 F.2d 867, 869 (Fed. Cir. 1991) (same).

83. At the moment, the law is in flux on this point. In May 2006, the Supreme Court rejected the Federal Circuit's approach of granting a near-automatic permanent injunction after a finding of patent infringement. *See* eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1838-39 (2006). The district courts are split on whether the Supreme Court's decision in *eBay* eliminates the Federal Circuit's use of a presumption of irreparable harm, and the Federal Circuit has not yet ruled on the question. *Compare* z4 Techs., Inc. v. Microsoft Corp., 434 F. Supp. 2d 437, 439-40 (E.D. Tex. 2006) (rejecting the presumption), *with* Christiana Indus. v. Empire Elecs., Inc., No. 06-12568, 2006 WL 2087642, at *2 (E.D. Mich. Aug. 4, 2006), *vacated in part*, 2006 WL 2375956 (E.D. Mich. Aug. 16, 2006) (accepting the presumption).

84. *See, e.g.*, Oakley, Inc. v. Sunglass Hut Int'l, 316 F.3d 1331, 1345 (Fed. Cir. 2003) (affirming grant of preliminary injunction); DONALD S. CHISUM, CHISUM ON PATENTS §

preliminary relief of this sort can be swift. In Amazon's notorious infringement case against Barnes & Noble on the Bezos one-click patent, the Patent Office issued the patent on September 28, 1999,[85] Amazon sued Barnes & Noble on October 21, 1999,[86] and the trial court, after a five-day hearing that began on November 16, 1999, issued a preliminary injunction against Barnes & Noble's check-out process on December 1, 1999.[87] In other words, the suit went from a dead start to a preliminary injunction in one month and eleven days. Although the Federal Circuit would vacate this preliminary injunction fourteen and one-half months later,[88] Barnes & Noble had already suffered reduced sales for that period, which included two Christmas seasons. Map the speed of this proceeding onto the critical early stage of a new standardized product's market launch. How many standard adopters will sit on the sidelines for fourteen months while their licensed competitors sell standard-compliant items? If the patentee obtains a preliminary injunction, the case is over as a practical matter; the patentee will dictate the adopter's license terms.[89]

In light of patent law's default rules favoring injunctions, it is easy to see why individual SSO participants would not want to adopt a standard and invest in complying with it while at the same time exposing themselves to preliminary or permanent injunctions designed for business contexts far removed from standard setting for interoperability, such as a pioneer drug maker's effort to prevent sales of a competing generic drug. The RAND promise is designed to replace the pro-injunction tilt with ready adopter access to standard-essential

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20.04[1][e][i] (2002). More than a decade ago, Professor Merges brought out the central importance of this pro-injunction tilt in securing patent rights as property and thereby fostering efficient private ordering. *See* Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2661-67 (1994).

85. Method and System for Placing a Purchase Order Via a Communication Network, U.S. Patent No. 5,960,411 (issued Sept. 28, 1999), *available at* http://www.uspto.gov/patft/index.html.

86. Amazon.com, Inc. v. Barnesandnoble.com, Inc., 73 F. Supp. 2d 1228, 1232 (W.D. Wash. 1999) (granting preliminary injunction), *rev'd*, 239 F.3d 1343 (Fed. Cir. 2001) (vacating preliminary injunction).

87. *Id.*

88. The Federal Circuit vacated the injunction on February 14, 2001, concluding that Amazon failed to dispel the serious question Barnes & Noble raised about whether the one-click patent was invalid for obviousness. *See Amazon.com*, 239 F.3d at 1343.

89. In their empirical study of preliminary injunctions in patent cases, Professors Lanjouw and Lerner describe the preliminary injunction's "powerful impact" as a litigation "weapon":

> [P]ractitioner accounts suggest that . . . many firms request preliminary injunctions not just to avoid "irreparable harm" but also to impose financial stress on their rivals. An injunction proceeding itself raises the legal expenditure required to pursue a case through to a trial ruling. If, in addition, a plaintiff can shut down a significant fraction of a defendant's operations for months or years while an issue is being resolved, the defendant is likely to experience a sharp reduction in operating cash flow.

Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 573-74 (2001).

patent licenses. With access assured, adopters trust enough to make the investments needed to bring the standardized technology to market, driving rapid market growth for mutual benefit.

II. RECOGNITION THAT THE RAND PROMISE DISPLACES INJUNCTIONS

Patent law's pro-patentee injunction norm is ill-suited to the open SSO milieu, the basic premise of which is vigorous competition among adopters who have ready access to the technology they need to produce the standardized item. Economists and lawyers who have analyzed the standard-setting process recognize this fact, openly discussing both the tension between a patentee's conventional injunction-backed bargaining power and dependable long-term access to SSO output, and the role of the RAND promise in resolving that tension. Oddly, having identified this core function of the RAND promise, these same analysts suggest that the promise's basic meaning lies elsewhere.

For example, Professors Shapiro and Varian (both economists), in their illuminating work on the business strategies common to the network technology domain, identify the cession of control as a key step in cooperative technology adoption for a network market. According to Shapiro & Varian,

> [t]he underlying idea is *to forsake control* over the technology to get the [consumer adoption] bandwagon rolling. If the new technology draws on contributions from several different companies, *each agrees to cede control* over its piece in order *to create an attractive package*: the whole is greater than the sum of the parts.[90]

They also identify the RAND promise as the means for ceding control:

> A fundamental principle underlying the consensus approach to standards is that they should be "open," with no one or few firms controlling the standard. Thus, a quid pro quo for having one's technology adopted in a formal standard is a commitment to license any patents *essential* to implementing the standard on "fair, reasonable, and nondiscriminatory" terms.[91]

Professor Shapiro emphasizes this same basic function of the RAND promise in subsequent work on standard setting, linking participants' insistence on the RAND commitment at the threshold of the formulation stage to the prevention of holdup problems at the implementation stage. According to Shapiro,

> once a standard is picked, any patents (or copyrights) necessary to comply with that standard become truly essential . . . and the standard itself is subject to "hold-up" if these patent holders are not somehow obligated to license their patents on "reasonable terms." . . . [F]or precisely this reason, standard-setting bodies require participants to license any essential patents on reasonable terms as a *quid pro quo*

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90. SHAPIRO & VARIAN, *supra* note 2, at 199-200 (emphasis added).

91. *Id.* at 238 (emphasis in original).

before adopting any standards.[92]

In other words, the RAND promise is the very "somehow" by which participant-patentess are "obligated to license their patents on reasonable terms."[93] Oddly, earlier in the same discussion, Shapiro suggests that holdup can occur even with a RAND policy where a patent owner's "precise licensing terms" are left "vague" in an effort to avoid the appearance of an unlawful buyers' cartel: "this caution can in fact lead to ex post holdup by particular rights holders, contrary to both the goal of enabling innovation and to consumers' interests."[94] Such a holdup cannot occur, however, if the court confronted with a license dispute interprets the RAND promise, consistent with its core function, as an irrevocable waiver of the patentee's right to extraordinary relief for infringement, i.e., an injunction (preliminary or permanent) or enhanced damages for willful or bad faith infringement.[95] All that remains for the court to do, once it properly construes the RAND promise, is to referee the parties' conflicting claims about whether the patentee's license terms are reasonable and nondiscriminatory.[96]

Legal analysts have shown a similar blend of keen insight and befuddlement

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92. Shapiro, *supra* note 12, at 136; *see also id.* at 124-26 (describing the general patent holdup problem).

93. *See id.*

94. *Id.* at 128.

95. The Patent Act provides that in an infringement case "the court may increase the damages up to three times the [compensatory damages] amount found or assessed." 35 U.S.C. § 284 (2000). The courts have interpreted this provision in conventional cases removed from standard setting to permit, but not compel, enhanced damages where the infringement was willful or in bad faith. *See* Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1342 (Fed. Cir. 2004) (en banc). In other words, "enhanced damages are punitive, not compensatory." Sensonics, Inc. v. Aerosonic Corp., 81 F.3d 1566, 1574 (Fed. Cir. 1996). The threat of punitive damages in conventional cases helps deter infringement that may be difficult to detect. *See* Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585, 1640 (1998) (concluding that "[s]ome enhancement of the patentee's [damages] award . . . may be necessary to deter those infringers who know about the patent, or who could learn about it at a reasonable cost, but whose conduct otherwise might go undetected or undeterred"). A punitive damages award is, however, improper in the context of an adopter who has negotiated in good faith, albeit unsuccessfully, with the owner of a standard-essential patent who is bound by the RAND promise. *But cf. id.* at 1641 (concluding that "a finding that the defendant's conduct is only marginally unlawful weighs against" enhanced damages, and "may even counsel in favor of limiting the recovery to an award of compensatory damages only"). First, the adopter has not acted in disregard of the patentee's rights but actively sought to come to reasonable license terms with the patentee. Second, infringement of a standard-essential patent is not so hard to detect that it warrants extra deterrence both because the adopter has sought out the patentee and because adopters must actively communicate their use of the standard to attract consumers (which communication patentees can readily detect).

96. As indicated earlier, the courts have some models to aid them in this inquiry. *See supra* notes 17-22 and accompanying text.

about the RAND promise's meaning. For example, Mr. Schallop concludes that the RAND policy's meaning "is not entirely clear."[97] At the very same time, however, he focuses in on its precise meaning: "this contractual language, at a minimum, requires that essential IPR owners not chill the adoption and proliferation of the . . . standard through the enforcement of their essential patent rights by enjoining competitors from practicing the standard."[98] Similarly, Mr. DeVellis concludes that, "[a]lthough the meaning of 'reasonable' is not well settled, it seems to require, at a minimum, that patent holders offer terms that will not prevent their competitors from practicing the standard."[99] He also concludes that a useful "patent policy *must create a duty* requiring members to agree to reasonable licensing terms."[100] An irrevocable waiver of injunctive relief that ensures adopters' long-term access to standard-essential technology is, of course, the lynchpin of such a "duty," i.e., an obligation to license for which adopters have a corresponding access right.

Professor Lemley, who offers the most extended and penetrating legal analysis of the RAND promise, repeatedly casts its role in conferring long-term access on adopters as a patentee's waiver of the injunction right. In describing the SSOs that use the RAND policy, he states that "[t]hey permit their members to own IP rights, but require those members to commit in advance to licensing those rights on specified terms and *to forgo injunctive relief altogether*."[101] Similarly, in describing the relief available to a frustrated adopter who brings a contract action against a participant-patentee over failure to license, he concludes that "[s]pecific performance of *an obligation to license* on royalty-free or [RAND] terms seems particularly appropriate; the defendant [patentee] *had already agreed to give up a legal right* in exchange for something of value, and is merely being prevented from asserting *the right it had given up*."[102] After reviewing patent law's implied license doctrine as an alternate interpretive route, Professor Lemley concludes that implied license is the better route precisely because it more firmly removes the injunction threat:

> I think it is preferable as a policy matter to construe an IP owner's agreement to an SSO IP-licensing requirement as the grant of a license itself, rather than merely a contract with the SSO. . . . [M]ost importantly, the implied-license approach reduces opportunism by IP owners. Under the contract approach, IP owners have an incentive to assert claims for patent infringement against users of well-established

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97. Schallop, *supra* note 12, at 227.

98. *Id.*; *see also id.* at 230 (concluding that the RAND promise "ensures that a participant will not significantly hinder the proliferation of the standard by threatening to unduly interfere (e.g., attempt to license at an overvalued royalty rate) or enjoining others (e.g., via an injunction) from practicing the standard because of its patent").

99. DeVellis, *supra* note 16, at 346.

100. *Id.* at 347 (emphasis added).

101. Lemley, *supra* note 7, at 1902 (emphasis added).

102. *Id.* at 1916 (emphasis added).

> standards, even if the owners previously agreed to license those patents on reasonable and nondiscriminatory terms. By threatening to prevent use of the standard, they can coerce significantly more than a reasonable royalty from users. Determining that IP owners have already licensed their patents prevents such opportunism.[103]

In short, whether denominated a contract or an implied license, the key goal on which Lemley rightly focuses is removing the threat of injunction from the patentee's arsenal. He uses these insights into the RAND promise's function as a bridge to Professor Merges' work on collective rights organizations, analyzing SSO IP policies as a form of private ordering (albeit a "messy" one) and contrasting them with patent pools.[104] Finally, extending prior analyses of the RAND policy, he shows that a participant's commitment to license essential patents is ongoing, not temporary.[105]

Notwithstanding his cogent focus on the RAND promise's role in eliminating the threat of injunction, and thus of post-standardization holdup, Professor Lemley also describes the RAND policy as unclear and uncertain: "while IP owners at many SSOs [in the study] were required to license their rights on reasonable and nondiscriminatory terms, it isn't clear what those obligations mean in practice,"[106] and SSO IP policies "are ambiguous on important terms."[107] He suggests the SSOs have left the meaning of the RAND policy ill-defined by failing to explain it in more detail:

- "While 'reasonable and nondiscriminatory licensing' thus appears to be the majority rule among SSOs with a patent policy, relatively few SSOs gave much explanation of what those terms mean or how licensing disputes would be resolved."[108]
- "One of the most common requirements imposed on IP owners is an obligation to license IP rights on reasonable and nondiscriminatory terms. But virtually no SSO policies specify what that phrase means, leaving courts to decide what terms are 'reasonable.'"[109]
- "Virtually no SSO specifies the terms on which licenses must be granted beyond the vague requirement that they be 'reasonable' and 'nondiscriminatory.' . . . The result is uncertainty over the cost and scope of patent licenses that may not prove much better than having no policy at all."[110]

He also urges SSOs to "give content to the reasonable and nondiscriminatory licensing requirement," concluding that, "without some idea of what those

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103. *Id.* at 1925.
104. *Id.* at 1948-57.
105. *Id.* at 1912, 1914 & n.83.
106. *Id.* at 1906.
107. *Id.* at 1957.
108. *Id.* at 1906.
109. *Id.* at 1913.
110. *Id.* at 1964-65.

[RAND] terms are, reasonable and nondiscriminatory licensing loses much of its meaning."[111]

Professor Lemley is right to urge that SSOs can enhance their IP policies by elaborating upon the full meaning of the RAND promise, but he errs in suggesting that the RAND promise "loses much of its meaning" in the absence of such elaboration.[112] So long as the RAND promise is construed according to its core function as an irrevocable waiver of extraordinary remedies, it is hard to know what more the SSOs that rely on it should be required to say to make it an effective means to eliminate post-adoption holdup. It locks in the adopters' right to access the technology on reasonable terms. Parties can negotiate license terms later without fear of an injunction or treble damages, and with far more information about the scope of standard-essential patents and market conditions. The courts have "experience with determining reasonable royalties in the patent context,"[113] and the parties can resort to them if negotiations fail.

All these economists and lawyers have advanced our understanding of the RAND promise by squarely identifying its core function of preventing post-standardization holdup. At the same time, their hesitation to conclude that the RAND policy's core function dictates it basic meaning suggests that its meaning is unclear, or lies elsewhere. It does not.

III. THE RAND PROMISE AS GOVERNANCE STRUCTURE

The central question for those who plan to collaborate on an ICT standard that may be covered by a privately owned patent is this: who, if license negotiation fails, holds the access right to the patent—the patent owner, or individual adopters? The animating theory of group standard-setting dictates that it must be the adopters. If the owner of a standard-essential patent can enjoin (or threaten to enjoin) would-be adopters from practicing the standard, the very enterprise of adopting a standard fails to meet its basic purpose. The RAND promise is intended to reallocate the access right from the patentee to the

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111. *Id.* at 1964. His suggestions for adding content to the RAND policy—all of which strike me as highly worthy of adoption—do not actually make the RAND promise's core role in precluding injunctions any more explicit. He recommends that SSOs "require members who assert patents to make available to others a copy of all their licenses involving the patent"; "specify[] whether royalty rates must be identical for all parties, or whether potential licensees in different situations may be treated differently"; "prevent certain kinds of restrictive nonprice license terms such as grantback clauses and noncompetition agreements"; and "set up some means of dispute resolution within the [SSO] to help resolve royalty disagreements," such as "an arbitration group specializing in standards conflicts." *Id.* at 1965-66 & n.329. *See also* Mark A. Lemley, *Ten Things to Do About Patent Holdups of Standards (and One Not To)* 4-11 (Stan. Pub. Law Working Paper No. 923470, 2006), *available at* http://ssrn.com/abstract=923470 (describing five steps SSOs can take and five legal reforms others can make to ameliorate holdup and royalty stacking problems in standards patent licensing).

112. Lemley, *supra* note 7, at 1964.

113. *Id.* at 1966 & n.331.

adopters. This is the RAND promise's central function and meaning.

Can matters truly be this simple? Can the RAND promise's function be merely to lock in adopters' right to access, for a reasonable fee, any standard-essential patent? The holdup problem that the RAND promise solves has, in fact, long been a subject of analysis in the transaction cost economics literature, part of the broader literature on the theory of the firm.[114] The theory of the firm helps illuminate the RAND promise's simplicity and power. By deploying it here, I connect analyses of SSO treatment of participants' IP rights to a growing literature that uses the theory of the firm to understand the contours of IP law more generally.[115]

A. Transaction Cost Economics and the Opportunism Problem

Why do complex, hierarchical business firms exist at all? Put another way, why is not all commerce conducted at arms' length in spot markets by independent individual actors? "In mundane terms, the issue is that of make-or-buy. What is it that determines which transactions are executed how?"[116]

Professor Coase sparked a sprawling literature on the theory of the firm with his seminal 1937 article, *The Nature of the Firm*,[117] which explores these interlocked questions. In the piece, he first contrasts "alternative methods of co-ordinating production," "exchange transactions on the market," in which "price movements direct production," and "a firm," in which "market transactions are eliminated and in place of [which] is substituted the entrepreneur-co-ordinator, who directs production."[118] Given the existence of these alternative mechanisms, Coase argues, the challenge is "to discover why a firm emerges at all in a

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114. *See generally* Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1760-63 (1989) (summarizing transaction cost economics as part of the theory of the firm).

115. *See* Dan L. Burk, *Intellectual Property and the Firm*, 71 U. CHI. L. REV. 3 (2004); Paul J. Heald, *A Transaction Costs Theory of Patent Law*, 66 OHIO ST. L.J. 473 (2005); Robert P. Merges, *A Transactional View of Property Rights*, 20 BERKELEY TECH. L.J. 1477 (2005) [hereinafter Merges, *Transactional View*]; Robert P. Merges, *Intellectual Property Rights and the New Institutional Economics*, 53 VAND. L. REV. 1857 (2000) [hereinafter Merges, *Property Rights*]; Oren Bar-Gill & Gideon Parchomovsky, *Intellectual Property Law and the Boundaries of the Firm* (University of Pennsylvania, Institute for Law & Economics Research Paper 04-19; Harvard Law School, Center for Law, Economics, and Business Discussion Paper No. 480, 2004), *available at* http://www.ssrn.com/abstract=559195; Dan L. Burk & Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights At the Boundary of the Firm* (University of Minnesota Law School Legal Studies Research Paper No. 06-11, 2006), *available at* http://www.ssrn.com/abstract=890944.

116. Oliver E. Williamson, *Introduction*, *in* THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT 3, 4 (Oliver E. Williamson & Sidney G. Winter eds., 1993).

117. R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), *available at* http://www.jstor.org.

118. *Id.* at 388.

specialised exchange economy."[119] His answer, in a phrase, is *transaction costs*: "The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism."[120] He identifies a number of component costs of market exchange, including the cost "of discovering what the relevant prices are" in the market, "[t]he costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market," and the rising cost of writing a contract fully to govern an increasingly long-term exchange relationship.[121] Indeed, on this last point—the cost of contracting for a long-term relationship—Coase surmises that "[a] firm is likely therefore to emerge in those cases where a very short term contract would be unsatisfactory."[122] The long-term relationship among SSO members, who both establish a standard and continue to license each other's IP rights in practicing the standard, is such a case.

Of course, if organizing a firm economizes on transaction costs, compared to the costs of transacting in a market, one might naturally wonder, "Why is not all production carried on by one big firm?"[123] The answer, once again, is cost: "Naturally a point must be reached where the costs of organizing an extra transaction within the firm are equal to the costs involved in carrying out the transaction in the open market, or, to the costs of organizing by another entrepreneur."[124] In short, "[w]hich transactions go where depends on the attributes of transactions, on the one hand, and the costs and competence of alternative modes of governance, on the other."[125]

"Transaction cost economics," building on the foundation laid by Coase, "is mainly concerned with the governance of contractual relations."[126] The transaction costs that drive organizational choice include both "ex ante costs of drafting, negotiating, and *safeguarding* an agreement" and "ex post costs of maladaptation and adjustment that arise when contract execution is misaligned."[127] Among the key ex post problems against which transacting parties seek to safeguard is the opportunism occasioned by asset specificity—the situation where a party invests in an asset that has far more value inside a specific trading relationship than outside it.[128] Once a party makes a relationship-specific

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119. *Id.* at 390.

120. *Id.*; *see also id.* at 392 ("[T]he operation of a market costs something and by forming an organization and allowing some authority (an 'entrepreneur') to direct the resources, certain marketing costs are saved.").

121. *Id.* at 390-91.

122. *Id.* at 392.

123. *Id.* at 394.

124. *Id.*

125. OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 25 (1996).

126. *Id.* at 222.

127. *Id.* at 379 (emphasis in original).

128. *See* Joskow, *supra* note 65, at 108; Klein et al., *supra* note 65, at 298-99. Professor Hart, in an overview piece about transaction cost economics, gives the following examples of relationship-specific investments:

investment, its trading partner may be able to extract a higher share of the ex post surplus.[129] How can parties guard against this opportunism? One option is to bring the transaction within a firm by integrating the separate operations into a single business or by creating a safeguard in their contract from the outset to reduce the likelihood of opportunism.[130] Professor Oliver Williamson, for example, explores the use of a contract-based "hostage," or bonding mechanism, that establishes sufficient trust to induce an exchange.[131] "If the first party reneges on the deal, the second can keep the hostage[,]" which "makes performance of the original deal more likely."[132]

All such contractual safeguard approaches, however, face a limiting condition. No contract can ever fully anticipate, and make provision for, all possible circumstances and outcomes in a complex relationship. Indeed, this limiting condition is built into the very fabric of a transaction cost perspective: a fully detailed contract would be infinitely costly; therefore, no one writes them.[133] "Incompleteness of contracts," in turn, "opens the door to a theory of ownership."[134] When a contract that governs a complex relationship does not address a situation, the default positions dictated by basic property law rules will determine the parties' options for moving forward. In other words, "ownership is a source of power when contracts are incomplete."[135] As a result, one way to

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> locating an electricity generating plant adjacent to a coal mine that it going to supply it; a firm's expanding capacity to satisfy a particular customer's demands; training a worker to operate a particular set of machines or to work with a particular group of individuals; or a worker's relocating to a town where he has a new job.

Hart, *supra* note 114, at 1762.

129. *See* Hart, *supra* note 114, at 1762-63; Joskow, *supra* note 65, at 108; Klein et al., *supra* note 65, at 298-99.

130. *See* Joskow, *supra* note 65, at 108; Klein et al., *supra* note 65, at 299-300, 302-03.

131. *See* WILLIAMSON, *supra* note 125, at 120-44 (ch. 5).

132. Merges, *Transactional View*, *supra* note 115, at 1483. Professor Merges gives the following example of a hostage-type contractual safeguard against opportunism:

> One example is a performance bond, such as in a construction contract. A building contractor has all sorts of ways to delay, cheat, or otherwise trouble a client who wants a new building. So the client requires the contractor to post a fixed amount of money in the form of a bond, which the client can seize if the contractor acts opportunistically.

Id.

133. As Professor Hart puts it, "in practice, transaction costs are pervasive and large. A consequence of the presence of such costs is that the parties to a relationship will *not* write a contract that anticipates all the events that may occur and the various actions that are appropriate in these events." Oliver D. Hart, *Incomplete Contracts and the Theory of the Firm*, *in* THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT 141 (Oliver E. Williamson & Sidney G. Winter eds., 1993).

134. *Id.*

135. OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE 29 (1995). *See also* Hart, *supra* note 114, at 1766 ("[W]hen contracts are incomplete, the boundaries of firms matter in that these boundaries determine who owns and controls which assets."); Merges, *Transactional View*,

guard against opportunism is to allocate to the more vulnerable or important party a residual property right that helps protect his relationship-specific investment.[136]

The turn to property right allocation as a safeguard against opportunism illuminates the core function of the RAND promise as a matter of economic theory. SSO participants cannot write a contract that fully takes account of the royalty issues raised by standard essential patents that the participants themselves may own (or come to own later). This is so not because the participants are lazy, but because it is virtually impossible for them to write a full contract. SSO participants thus require a different opportunism preventing mechanism if they are to establish sufficient trust for the standard-setting process to move forward. The property rights approach to transaction cost economics suggests that, by focusing on who holds the access rights to standard essential patents, the parties can allocate the access right so as to minimize the threat of opportunism that might drive away SSO participants or standards adopters. The source of the potentially derailing holdup is a patentee's strong right to block access to its technology with the aid of a court backed injunction. The solution, then, is to reallocate the right to access the patent for standards compliance, a property-like right, to the adopter community as a whole. All participants are willing to do so because, behind the veil of ignorance that shrouds the final outcome of the standard setting process, participants are at least as likely to gain from eliminating the threat of disproportionate royalty demands from others as they are to lose the chance to extract disproportionate royalties from others.

The economic theory, at least, is straightforward. But do we see parties using real-world, property-based governance mechanisms to protect themselves from opportunism by reallocating rights to access and use technology? In fact, we do. It is to those real-world governance mechanisms I now turn.

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supra note 115, at 1486 ("[T]here are many real-world transactions in which comprehensive contracts are difficult to specify, write, and enforce. The deep legal default rights that accompany property ownership come strongly into play here. They make it safe for parties to enter contracts when virtually no other form of transactional safeguard would work as well.").

136. *See* Joskow, *supra* note 65, at 111 ("The property rights approach focuses on ownership of physical and intangible assets . . . where ownership carries with it the authority to determine how these assets will be used. . . . Ownership and the rights of control that go along with it change the status quo bargaining point within the firm and the ultimate allocation of the rents over which the bargaining takes place. That is, when specific investments are involved, ownership of the specific assets allocates the residual rights of control to the party that makes the specific investment." (citations omitted)); *see also* Margaret M. Blair, *Closing the Theory Gap: How the Economic Theory of Property Rights Can Help Bring "Stakeholders" Back Into the Theory of the Firm*, 9 J. MGMT. & GOVERNANCE 33, 35 (2005) ("The gaps in incomplete contracts can be filled by a variety of different decision rules, or institutional mechanisms for decision-making. One such decision rule is the assignment of 'property rights' which give the holders the right to make all decisions about the use of some assets that have not been otherwise assigned by contract." (footnote omitted)).

B. The Corporate Form and Opportunism Prevention

Corporate law and IP law scholars have offered accounts of two anti-opportunism governance mechanisms that are germane to understanding the meaning of the typical SSO RAND promise. One mechanism is the basic corporate form itself, which creates a separate legal person who holds the capital assets contributed by its founders and who uses the assets according to a governing board's direction. This separate legal entity, by taking ownership of founders' contributions, locks the assets into the venture that the corporation is founded to pursue. The other mechanism is the patent pool, which typically uses a separate licensing corporation to receive patents or licensing rights assigned by the pool's founders (as well as subsequent contributors). With the patent assets locked in to the central licensing entity and a royalty distribution mechanism established, the parties can compete in the market using the technology that stocks the pool.

The common thread in these two governance stories is that they prevent opportunism by locking assets into a long-term relationship in such a way that contributors cannot withdraw them from the common venture and thus destroy others' relationship-specific investments in the venture. Nor can the contributors even threaten to withdraw assets, in an effort to extract a greater share of the return on the group's venture once group work on their common goal has begun. This common thread makes both examples highly pertinent to understanding the RAND promise. Serving the same safeguard function as the corporate form, or the central licensing entity, the RAND promise locks in access to the contributing participant's technology for the entire standard adopter community. It does so by waiving the patentee's ability to resort to patent law's extraordinary remedies, such as injunctions and punitive damages.

1. Corporate Law and Locking in Capital.—"What is a business corporation? What purposes does and should it serve?"[137] For many years, the dominant answers within corporate law scholarship have been "a 'nexus' of private contracts" and maximizing returns to the shareholder.[138] The nexus of contracts approach "has provided insights into some important problems" but "obscured other problems."[139] In a series of papers, Professors Margaret Blair and Lynn Stout, writing separately and together, have used insights from

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137. Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corp. Law* (Vanderbilt Univ. Law Sch., Law and Economics Research Paper No. 05-26; UCLA Sch. of Law, Law and Economics Research Paper No. 05-27), *available at* http://ssrn.com/abstract=819365 [hereinafter Blair & Stout, *Anomalies*].

138. *Id.* at 4-6. On the "nexus of contracts" approach, see J. Mark Ramseyer, *Corporate Law*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 503-04 (Peter Newman ed., 1998).

139. Margaret M. Blair, *Why Markets Chose the Corporate Form: Entity Status and the Separation of Asset Ownership from Control* 1 (Georgetown Univ. Law Ctr., Business, Economics & Regulatory Policy Working Paper No. 429300, 2003), *available at* http://www.ssrn.com/abstract=429300.

transaction cost economics to explore the problem of how to encourage people with different assets and skills to make specific investments in a long-term collaborative business—a scenario that raises the specter of opportunism.[140] They argue that "one of the most important functions of corporate law" is "the creation of a legal and institutional basis for accumulating enterprise-specific physical capital, as well as specialized organizational and other intangible capital, and for 'locking in' that capital by discouraging premature asset withdrawal by managers, investors, and their heirs."[141]

Blair and Stout begin by identifying complex business ventures as instances of "team production,"[142] i.e., "production in which 1) several types of resources are used and 2) the product is not a sum of separable outputs of each cooperating resource . . . [and] 3) not all resources used in team production belong to one person."[143] Examples include "building railroads, developing new technologies, [and] creating trusted brand names."[144] Such ventures cannot succeed with specific investments from different participants, but "[s]pecific investment is discouraged when individual investors have a legal right to prematurely withdraw their contributions (and with it, the ability to opportunistically threaten to withdraw) in order to 'hold up' their fellow investors and extract a larger share

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140. *See supra* notes 137, 139; *infra* notes 141, 151.

141. *Id.* at 2 (citation omitted). Another phrase corporate law scholars have used, besides "lock in," is "'affirmative asset' partitioning." *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387, 393-94 (2000) (describing affirmative and defensive asset partitioning). Their focus, however, is "how affirmative asset partitioning reduces the cost of credit for legal entities," *id.* at 398, rather than how to encourage varied parties to make venture-specific investment.

Blair and Stout have their critics, of course. *See, e.g.*, Larry E. Ribstein, *Should History Lock In Lock-In?* (Illinois Law and Economics, Working Paper No. LE06-005, 2006), *available at* http://www.ssrn.com/abstract=883648. The goal of this Article is not to take sides on the nuances of corporate law scholarship. Rather, it is to show that theoretical insights from transaction cost economics, and opportunism prevention in particular, aid in understanding and interpreting existing real-world solutions to the problem of coordinating contributions from many parties in the development of a long-term, complex business venture (such as growing a competitive market on a standardized technology platform in the ICT sector). Blair and Stout, for their part, maintain that their approach "is consistent with the 'nexus of contracts' approach to understanding corporate law." Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 254 (1999) [hereinafter Blair & Stout, *Team Production*]. And, as Professor Stout recently noted, "incorporation [is not] the only way to lock in capital[,]" although it "may often be the cleanest, cheapest, and most effective way to lock assets into a joint enterprise." Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253, 258.

142. Blair & Stout, *Team Production*, *supra* note 141, at 249-50, 265.

143. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 779 (1972); *see also* Blair & Stout, *Team Production*, *supra* note 141, at 265 (quoting this same source).

144. Blair & Stout, *Anomalies*, *supra* note 137, at 17.

of the surplus generated by corporate activity."[145] It is difficult to configure the participants' incentives to encourage the needed specific investments. If participants agree in advance to a fixed sharing formula, individuals may shirk; after all, by hypothesis, it is difficult to value each individual's contribution to the result.[146] "On the other hand, if the team members have no fixed sharing rule but simply agree to allocate rewards after the fact," they risk "squandering time and effort haggling" as each "tr[ies] to grab a larger share of the total output."[147]

Blair and Stout, adapting a formal economic model from the team production literature,[148] conclude that the creation of a new separate entity, the public corporation, allows the venture participants to establish the right incentives to make venture-specific investments in relative confidence.[149] The key is that the corporation is a separate legal person, directed by an independent corporate board, that owns the participants' contributions to the venture and the venture's output. "The board enjoys ultimate decisionmaking authority to select future corporate officers and directors, to determine the use of corporate assets, and to serve as an internal 'court of appeals' to resolve disputes that may arise among the team members."[150] In other words, participants "agree not to specific terms or outcomes (as in a traditional 'contract'), but to participation in a process of internal goal setting and dispute resolution."[151] By yielding control of their property to the new entity, co-venturers greatly reduce the threat of later opportunism.

2. Patent Pools and Locking in Access.—When two different firms own patents on complementary technologies and each can thus block the other from entering the market for an item embodying the technology, they can clear the block by cross-licensing one another.[152] When the number of firms and patents

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145. *Id.*

146. Alchian & Demsetz, *supra* note 143, at 779-80; Blair & Stout, *Team Production*, *supra* note 141, at 266.

147. Blair & Stout, *Team Production*, *supra* note 141, at 266.

148. *See* Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 Q.J. ECON. 387 (1998).

149. *See* Blair & Stout, *Team Production*, *supra* note 141, at 271-76 (discussing Rajan & Zingales).

150. *Id.* at 276-77.

151. *Id.* at 278. In more recent work, Professor Blair canvasses the historical evidence for the proposition "that demand for the corporate form surged in the mid-nineteenth century United States because this form uniquely facilitated the establishment of lasting enterprises that could accumulate substantial enterprise-specific physical assets, and form extensive specialized organizational structures." Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 413 (2003). As people became interested in organizing increasingly complex, collaborative, long-term business ventures, "they discovered that incorporating and investing through a separate entity made it easier for them to make credible commitments to each other, and eventually to elicit ongoing investment" from both specialized managers and financiers. *Id.* at 427.

152. *See* U.S. DEP'T OF JUSTICE, FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE

grows, the simple cross-license morphs into the more complex arrangement known as a "patent pool."[153] "A patent pool is an arrangement by which two or more patent owners put their patents together and receive in return a license to use them."[154] Moreover, "[i]t is generally accepted that in cases of blocking patents or complementary patents, cross-licensing arrangements or patent pooling arrangements benefit competition," by opening a market where none could succeed before.[155] Given the risk of anticompetitive conduct such pools have raised historically,[156] however, much of the modern literature on patent pools focuses on the antitrust analysis of these arrangements.[157]

The goal here is not to recapitulate the antitrust analysis of patent pools. Instead, the goal is to focus on a structural feature that pervades the modern patent pool—namely, the central corporate entity that licenses the pool's patent assets. This central licensing entity, an example of the corporate form as an access lock-in governance mechanism, highlights the utility of the property rights approach to preventing opportunism in the specific domain of access to patent rights. The RAND promise, properly understood, is a simplified variant of the licensing entity mechanism.

Patent pools have, from the outset, been about making a way out of no way. Consider, for example, the sewing machine patent pool. In the 1850s, patent litigation between Elias Howe and Isaac Singer, and among sewing machine makers generally, consumed a large share of these firms' resources.[158] Indeed,

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LICENSING OF INTELLECTUAL PROPERTY § 5.5 (1995) ("[Cross-licensing] may provide procompetitive benefits by *integrating complementary technologies*, reducing transaction costs, *clearing blocking positions*, and avoiding costly infringement litigation." (emphasis added)). On blocking patents generally, Robert Merges, *Intellectual Property Rights and Bargaining Breakdown: The Case of Blocking Patents*, 62 TENN. L. REV. 75, 79-80 (1994); Gilbert Goller, *Competing, Complementary and Blocking Patents: Their Role in Determining Antitrust Violations in the Areas of Cross-Licensing, Patent Pooling and Package Licensing*, 50 J. PAT. OFF. SOC'Y 723, 723-27 (1968).

153. *See* 2 HERBERT HOVENKAMP ET AL., IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 34.2b (2002); Merges, *Contracting*, *supra* note 47, at 1347.

154. FLOYD L. VAUGHAN, THE UNITED STATES PATENT SYSTEM: LEGAL AND ECONOMIC CONFLICTS IN AMERICAN PATENT HISTORY 39-40 (1956).

155. HOVENKAMP ET AL., *supra* note 153, § 34.2c at 34-7; *see also* WARD S. BOWMAN, JR., PATENT & ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL 202 (1973).

156. *See* HOVENKAMP ET AL., *supra* note 153, § 34.3c at 34-15 (noting the Supreme Court's concern "over the potential for patent pools to serve as a framework for the implementation of collective output restraints or price-fixing schemes"); VAUGHAN, *supra* note 154, at 43-61 (discussing case examples of anticompetitive conduct).

157. *See, e.g.*, HOVENKAMP ET AL., *supra* note 153, § 34.4; David A. Balto & Andrew M. Wolman, *Intellectual Property and Antitrust: General Principles*, 43 IDEA 395, 445-53 (2003); Steven C. Carlson, Note, *Patent Pools and the Antitrust Dilemma*, 16 YALE J. ON REG. 359, 373-99 (1999).

158. *See* RUTH BRANDON, A CAPITALIST ROMANCE: SINGER AND THE SEWING MACHINE 88-99

newspapers at the time called it the "Sewing Machine War."[159] In October 1856, on the eve of an infringement trial in Albany, New York, Orlando Potter—a lawyer, and the president of one of the feuding firms—proposed a way for the competitors to get past their mutually blocking patent positions[160] and compete in the market for sewing machines: the three companies in question "owned, between them, almost all the patents worth owning. Why not pool their interests instead of wasting time and money conducting these interminable fights?"[161] Thus was born the first U.S. patent pool, "the Sewing Machine Combination," and they persuaded Howe to join as well.[162] Each agreed to pay a fixed fee for every machine sold, in return for a license to all the patents in the pool. "Part of this money was to be reserved to fight infringers, and the rest would be divided between them."[163] Two subsequent, industry-wide pools also helped to resolve pending or threatened litigation—the automobile patents pool established in 1915, known as the Automobile Manufacturers Association, and airplane patents pool established in 1917, known as the Manufacturers Aircraft Association ("MAA").[164] All followed the same basic pattern—a pool of patents licensed to all, in exchange for a share of royalty revenue.

The MAA also contained the germ of the modern pool's central patent holding company. Patent litigation plagued the airplane business from 1909, when Orville and Wilbur Wright sued Glenn Curtiss.[165] "With the formal entry of the United States into World War I imminent, however, a solution to the patent litigation was sought by the government[,]" and, "[f]ollowing the U.S. declaration of war in April 1917, the National Advisory Committee for Aeronautics proposed a cross-licensing agreement."[166] The resulting pool was submitted to the U.S. Attorney General, Thomas Watt Gregory, for his opinion about whether it ran afoul of the antitrust laws. In his October 1917 opinion clearing the pool,[167] General Gregory summarized its terms. First, the pool entailed the creation of the MAA as a New York corporation; the stockholders were the companies contributing patents to the pool and receiving licenses in return.[168] Second, under the license agreement between MAA and its

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(1977) (describing this infringement litigation).

159. *Id.* at 89.

160. *Id.* at 97-98.

161. *Id.* at 98.

162. *Id.*

163. *Id.*

164. *See* VAUGHAN, *supra* note 154, at 62-67 (describing the auto and airplane pools). The interested reader can learn more about the details of the automobile patents pool in WILLIAM GREENLEAF, MONOPOLY ON WHEELS: HENRY FORD AND THE SELDEN AUTOMOBILE PATENT 244-47 (1961).

165. *See* George Bittlingmayer, *Property Rights, Progress, and the Aircraft Patent Agreement*, 31 J.L. & ECON. 227, 231 (1988).

166. *Id.* at 231-32.

167. *See* Manufacturers Aircraft Association—Antitrust Laws, 31 Op. Att'y Gen. 166 (1917).

168. *Id.* at 166-67.

stockholders, the stockholders "grant[ed] to each other licenses under all airplane patents of the United States[,]" and "appoint[ed] the Association (Inc.) their agent with full power to grant the nonexclusive licenses provided for in the agreement."[169] The contributing airplane patentees, by creating the MAA as a licensing arm, helped ensure all licensees long-term access to patents in the pool. Indeed, the pool lasted until 1975, when its antitrust problems became insuperable.[170]

The patent-holding, central licensing entity is the hallmark of the modern patent pool. As Professor Merges describes it, "[m]ultiple patent holders assign or license their individual rights to a central entity, which in turn exploits the collective rights by licensing, manufacturing, or both."[171] Put another way, "[p]atent pools function according to liability rules[,]" rather than injunction-driven property rules.[172] This is because all four large-scale pools that have been the subject of an Antitrust Division business review letter,[173] beginning with the MPEG pool in 1997, place licensing rights in the hands of a central licensing entity. In the MPEG pool, the founding patentees established MPEG LA, a Delaware limited liability company, as the central license administrator and licensed their respective MPEG patents to MPEG LA for sublicensing to others.[174] In the Philips DVD pool, the founding patentees granted Philips patent licensing rights, and Philips agreed to combine those rights with its own and license them as a portfolio to all interested third parties.[175] Similarly, in the Toshiba DVD pool, the founding patentees granted Toshiba patent licensing rights, and Toshiba agreed to combine those rights with its own and license them as a portfolio to all interested third parties.[176] Finally, in the 3G wireless pool,

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169. *Id.* at 168. MAA, for its part, "accept[ed] the appointment as agent of its subscribers, for granting and enforcing the license provided for in the agreement, and for enforcing the other obligations of the subscribers under the agreement." *Id.* at 169.

170. *See* Bittlingmayer, *supra* note 165, at 234-35.

171. Merges, *Institutions*, *supra* note 47, at 133; *see also* HOVENKAMP ET AL., *supra* note 153, at 34-35 ("Alternatively, when two or more patent owners form a separate entity, and assign or license specified patent rights to the entity, the resulting arrangement is usually referred to as a patent pool."); VAUGHAN, *supra* note 154, at 40 ("By means of assignment the control of the patents is usually vested in an individual or a corporation . . . ."). According to Professor Merges, even relatively small-scale pools "consolidate property rights in a central entity (*i.e.*, the contract)." Merges, *Institutions*, *supra* note 47, at 140.

172. Merges, *Contracting*, *supra* note 47, at 1341.

173. *See* 28 C.F.R. § 50.6 (2006) (establishing business review letter process).

174. Letter from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, to Gerrard R. Beeney, Esq., Sullivan & Cromwell 2-3 (June 26, 1997), http://www.usdoj.gov/atr/public/busreview/215742.pdf.

175. Letter from Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, to Garrard R. Beeney, Esq., Sullivan & Cromwell 2-6 (Dec. 16, 1998), http://www.usdoj.gov/atr/public/busreview/2121.pdf.

176. Letter from Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, to Carey R. Ramos, Esq., of Paul Weiss Rifkind Wharton & Garrison 2-3, 6 (June 10,

the founding patentees established "five separate and independent Platform Companies . . . , one for each of the five 3G radio interface technologies [involved], with a separate Licensing Administrator . . . and a separate board of directors for each PlatformCo."[177] Participating patentees make themselves "subject to th[e pertinent] PlatformCo's licensing obligations" to interested third parties.[178] In all four instances, then, the pool founders locked in long-term access to the pool's patents by transferring licensing rights to an independent central entity. The Antitrust Division, for its part, concluded that the pools presented no antitrust problems.

The modern pool's central corporate entity has the right to license the patents in the pool. It locks in access for the contributing adopters, distributing revenue according to an established licensing formula. Pool founders establish the arrangement to take advantage of their well-identified stake in the market as patentees. By contrast, when SSOs meet to establish anticipatory standards, participants do not know whether they will, in the end, be patetentees or licensees or both. A formal pooling arrangement is not yet appropriate. The RAND promise, however, locks in access to essential patents in a manner that takes account of the prospective nature of the standard setting process. This is done for much the same reason—to prevent opportunistic haggling over specific investments in building to the collaboratively established standard.

C. The RAND Promise and Access Lock-In

The RAND promise, like the licensing company at the center of a patent pool, locks in adopters' access. It does so by granting adopters an irrevocable right to use the patented technology to build to the standard, in exchange for a reasonable royalty and other reasonable terms. Although the RAND promise is a far less elaborate, formalized structure than a patent pool's central licensing company, or a corporation, it is functionally equivalent to these entities as a governance structure aimed at preventing opportunism.

The scope of the access grant to adopters embodied in the RAND promise makes sense, given the circumstances common to anticipatory standard setting. On the one hand, because the long-term right to practice the patented invention is essential for adopters, it is insufficient to grant a routine, revocable license that permits a patent owner to get an injunction and thereby shut out an adopter. However, given that the same patented technology may have multiple uses as yet unknown (after all, standard setting takes place early in the technology life cycle), outright assignment of the patent (or the full right to license it) to an independent licensing corporation is too much to ask of a patentee. Such an assignment would needlessly complicate, or perhaps preclude, the patentee from

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1999), http://www.usdoj.gov/atr/public/busreview/2485.pdf.

177. Letter from Charles A. James, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, to Ky P. Ewing, Esq., Vinson & Elkins 4 (Nov. 12, 2002), http://www.usdoj.gov/atr/public/busreview/200455.pdf.

178. *Id.* at 5.

effectively exploiting the patented technology outside the standard context. A grant that both eliminates the prospect of injunctive relief, ensuring adopters long-term access, and otherwise leaves the patent rights in the owner's hands, allowing for exploitation in other contexts, is best tailored to the circumstances. This is precisely the grant that the RAND promise embodies.

One technical problem with this construction is that, without more, it might systematically permit licensees to force a less-than-reasonable royalty by refusing to pay (or pay enough) unless sued. Specifically, under the U.S. attorney fee rule, each litigation party generally pays its own way.[179] An adopter might use this fact to force a royalty discount just less than the best estimate of the patentee's attorney fees in an infringement suit to establish reasonable license terms. The RAND promise should not be a shield for this forced discount, and there is a patent law mechanism to prevent it. The Patent Act's fee-shifting rule in favor of the prevailing party is targeted at "exceptional cases."[180] Although the provision has not been used in such a way before, a court could readily use it to shift fees in a patentee's favor in cases where the reasonable license terms the court sets are not materially different from those the patentee had been willing to accept before the litigation. Such an approach is a fair analogy to existing fee awards in favor of prevailing patentees, which can be based on an accused infringer's maintaining the litigation in bad faith.[181] Professors Cowie and Lavell make a similar suggestion.[182]

D. New Challenges for Improving RAND Promise Implementation

The bedrock meaning of the RAND promise is clear. It locks in adopters' access to patents on technology that participants have contributed to the standard. Two additional licensing issues merit brief mention: post-standardization patent transfers and the likely utility of arbitration for resolving disputes over particular RAND license terms.

1. Licensing a Patent After an SSO Participant Sells It to a Nonparticipant.—What is a court to do in the case where, after a standard is set and adopters are marketing standard-compliant items, a new patent owner who did not participate in the standard setting process, and thus did not make the RAND promise, sues to exclude an adopter from access to the patent? Does the

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179. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 533 (1994) ("[W]e are mindful that Congress legislates against the strong background of the American Rule. Unlike Britain where counsel fees are regularly awarded to the prevailing party, it is the general rule in this country that unless Congress provides otherwise, parties are to bear their own attorney's fees.").

180. 35 U.S.C. § 285 (2000) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party.").

181. *See, e.g.*, Imonex Servs., Inc. v. W.H. Munzprufer Dietmar Trenner GmbH, 408 F.3d 1374, 1378 (Fed. Cir. 2005) (upholding an award of attorney fees in prevailing patentee's favor).

182. Cowie & Lavelle, *supra* note 12, at 149 ("A court could find that . . . the defendant who refuses to accept a reasonable offer and forces the patentee to litigate is liable for the patent holder's attorneys' fees under Section 285.").

original patentee's promise to license on RAND terms bind the patent's next owner? RAND policies do not include a detailed statement on this point, although one major ICT SSO—the IEEE Standards Association—is considering amending its policy to include such a statement.[183] The point is not a trivial one, for we know such post-standardization disputes can arise.[184]

It is clear, from the foregoing analysis, that adopters' need for access to the technology does not diminish merely because the patent changes hands. For the RAND promise to serve its opportunism-prevention function effectively, the promise cannot be defeated by the simple expedient of transferring the patent to one who did not make the RAND promise.[185] If interpretation is to follow function, then, the next owner takes the patent subject to the access rights already locked in. Much like a servitude, the access grant that the RAND promise embodies continues to burden the patent, even when it is sold to another party. Of course, SSOs can help ensure the courts will not err in this context by making explicit that the RAND promise follows the patent if it is transferred.

2. Arbitrating License Disputes to Streamline Technology Adoption.—Even with the improved understanding that this Article and others offer those who use the standard setting process, there may be more uncertainty about patent enforcement and licensing terms than is healthy for increasingly prevalent

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183. *See* Fromm & Skitol, *supra* note 73, at 78 ("Submitted [letters of assurance] would be irrevocable and also binding on subsidiaries, affiliates, successors, and assignees.").

184. *See* ESS Tech., Inc. v. PC-Tel, Inc., No. C-99-20292 RMW, 1999 WL 33520483, at *1 (N.D. Cal. Nov. 4, 1999) ("Before [adopter ESS] and [original patentee] GDC could resolve all their differences, defendant PC-TEL acquired GDC toward the end of 1998. [ESS] alleges that [PC-TEL] then reversed course and started demanding increasingly unreasonable and discriminatory terms for licensing the V.34 and V.90 patents."). This issue came to the fore in December 2004 when, as part of a bankruptcy proceeding, Commerce One auctioned off a portfolio of seven patents and thirty-two pending applications for $15.5 million. The portfolio "cover[ed] a broad spectrum of electronic communication and web service technologies and standards." David G. Barker, *Troll or No Troll? Policing Patent Usage With an Open Post-Grant Review*, 2005 DUKE L. & TECH. REV. 9, 9 (2005). Novell Corporation, which purchased the portfolio anonymously through a shell named "JGR Acquisitions," has since stated that it "acquired the patents for defensive reasons and did not plan to seek licensing revenue from them." John Markoff, *Secretive Buyer of Some E-Commerce Patents Turns Out to be Novell*, N.Y. TIMES, May 2, 2005, at C3. Such scenarios will likely become more common in view of the fact that "a secondary market is emerging for intellectual property acquired by individuals and corporations not involved in the original inventions." *Id.*

185. Professor Lemley makes an argument along these lines in urging that an SSO participant's licensing obligation continues even after the participant leaves the SSO. *See* Lemley, *supra* note 7, at 1912 ("A member that has agreed to license its IP rights covering a standard on reasonable and nondiscriminatory terms has presumably committed to an ongoing license, not a temporary one. For that member to be able to revoke a license already granted for an existing standard when it leaves the SSO would leave users of existing standards with debilitating uncertainty. It would also encourage strategic behavior by firms that promise to license their patents, only to revoke that promise once the standard was widely adopted.").

standard setting activities in the ICT sectors. In addition, as more varied firms participate in SSOs, the firms' different norms and expectations may clash more with one another and with an SSO's existing norms and traditions; in other words, as shared norms play a diminishing role in restraining opportunism, the need for still more elaborate contractual safeguards may increase.

To the extent that SSO participants conclude that existing uncertainty is undesirable, they can elaborate on the meaning of the RAND promise, along the lines discussed above.[186] Most important, they can augment their IP policies to provide that one who undertakes the RAND promise also agrees to submit disputes with adopters about license terms to binding arbitration. Admittedly, this suggestion has been made before: both longtime standard-setting expert Ken Krechmer and Professor Lemley have discussed the wisdom of developing arbitration mechanisms for resolving RAND licensing disputes.[187] Few SSOs appear to include such an arbitration provision, suggesting that participants do not feel arbitration offers benefits worth the trouble of drafting the provision.

Perhaps SSOs hesitate to require an agreement to arbitrate RAND license term disputes out of the same fear of antitrust liability that has chilled ex ante discussion of license terms.[188] It is possible, however, to frame an arbitration requirement that does not involve the SSO itself in the merits of any particular arbitration to resolve a bilateral license dispute between a participant patentee and adopter. For example, an SSO could require that, when a participant patentee promises to license essential patents to adopters on RAND terms, the patentee thereby also promises to arbitrate any license term dispute with an adopter under the American Arbitration Association's *Supplementary Rules for the Resolution of Patent Disputes*.[189] The American Arbitration Association[190] maintains, under these rules, a "National Panel of Patent Arbitrators" with

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186. *See supra* note 111 and accompanying text.

187. Ken Krechmer, *The Meaning of Open Standards* (Hawaii Int'l Conf. on Sys. Sci. Jan. 2005) ("approach #2 (RAND—the manner of operation of most formal SSOs currently) might be more acceptable to implementers if an IPR arbitration function existed when IPR is identified during the creation/modification of a standard"), http://www.csrstds.com/openstds.html; Ken Krechmer, *Communications Studies and Patent Rights: Conflict or Coordination* (The Econ. of the Software and Internet Indus. Jan. 2005) ("Patents have become an increasing part of standards development and could be addressed in an open process separate and parallel to the technical standards work. One approach could be to have WIPO or some similar organization provide the necessary legal and arbitration services to implement the function of a patent clearing house for patent holders identified in the SDO committees."), http://www.csrstds.com/star.html; Lemley, *supra* note 7, at 1966 ("SSOs might set up some means of dispute resolution within the organization to help resolve royalty disagreements. Resolving reasonable royalty disputes within the SSO will almost certainly be quicker and cheaper than resorting to the courts. It may also permit the disputants to take advantage of the industry expertise that many SSOs have." (footnotes omitted)).

188. *See supra* note 69 and accompanying text.

189. *See* American Arbitration Association, *Supplementary Rules for the Resolution of Patent Disputes* (Jan. 1, 2006), http://www.adr.org/sp.asp?id=27417 [hereinafter *Supplementary Rules*].

190. *See* http://www.adr.org/.

"experience in patent law and/or special technical expertise."[191] This is just an example; numerous arbitration service providers have IP expertise.[192] Because the linchpin of a RAND license dispute is essentially factual—what term is reasonable and nondiscriminatory, under the circumstances?—arbitration by someone with technical or licensing knowledge is especially fitting.[193] If SSOs signal to the arbitration services market that particular types of expertise are needed, providers will likely strive to meet that demand.[194] SSOs could doubtless benefit from considering the question of arbitration mechanisms in their next IP policy revisions.

CONCLUSION

The typical RAND promise is short, but it is not vague or uncertain. Its core function dictates its meaning. SSO participants, by freely choosing to make the RAND promise before helping to formulate a standard that may include their technologies, remove the possibility of a post-adoption holdup and thereby foster the trust that fuels the standards process in the first place. The participants eliminate holdups because the RAND promise itself transfers to the adopter community an irrevocable access right to the technology that standard-essential patents cover. This transfer to adopters takes patent law's default injunction rules off the negotiating table.

The RAND promise thus creates a fundamentally new framework for all future discussions of royalty rates and other license terms. It is, in other words, a governance mechanism. It is the one that firms in the ICT sector have most often used to help set the stage for the long-term, complex project of cooperatively building a competitive market atop a common interface standard. As a governance mechanism, the RAND promise is as traditional as it is clear, drawing on more than 150 years of experience with, and more than 60 years of theorizing about, the governance structures of business firms. SSO participants and the courts can draw on this history to give full effect to the RAND licensing promises they have made.

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191. *Supplementary Rules*, *supra* note 189, ¶ 2.

192. "Among the many agencies offering rules to decide IP disputes via arbitration are the AAA, the CPR International Institute for Conflict Prevention and Resolution, the National Arbitration Forum, and the International Chamber of Commerce." Kevin R. Casey, *The Suitability of Arbitration for Intellectual Property Disputes*, 71 PAT. TRADEMARK & COPYRIGHT J. (BNA) 143, ¶ E.4 (Dec. 2, 2005).

193. *Id.* ¶ C.2.

194. *See* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 52-53 (1999) (describing how arbitration providers compete to meet perceived service demands). For background information on arbitration, see EDWARD BRUNET & CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 315-18, 324-32 (2d ed. 2001).

APPENDIX

IETF's patent policy is set forth in Scott Bradner, *Intellectual Property Rights in IETF Technology*.[195] The policy makes clear that "[i]n general, IETF working groups prefer technologies with no known IPR claims or, for technologies with claims against them, an offer of royalty-free licensing."[196] Like ANSI-accredited bodies, however, "IETF working groups have the discretion to adopt a technology with a commitment of fair and non-discriminatory terms, or even with no licensing commitment, if they feel that this technology is superior enough to alternatives with fewer IPR claims or free licensing to outweigh the potential cost of the license."[197]

The policy operates similarly to the ANSI policy, i.e., disclosure of a pertinent patent claim triggers a request for a written licensing commitment from the standard-setting participant. Specifically,

> Where Intellectual Property Rights have been disclosed for IETF Documents as provided in Section 6 of this document, the IETF Executive Director shall request from the discloser of such IPR, a written assurance that upon approval by the IESG for publication as RFCs of the relevant IETF specification(s), all persons will be able to obtain the right to implement, use, distribute and exercise other rights with respect to Implementing Technology under one of the licensing options specified in Section 6.5 below unless such a statement has already been submitted.[198]

The licensing options, in turn, provide the RAND promise as one of two options. According to the "IPR Disclosures" rules in § 6,

> Since IPR disclosures will be used by IETF working groups during their evaluation of alternative technical solutions, it is helpful if an IPR disclosure includes information about licensing of the IPR in case Implementing Technologies require a license. Specifically, it is helpful to indicate whether, upon approval by the IESG for publication as RFCs of the relevant IETF specification(s), all persons will be able to obtain the right to implement, use, distribute and exercise other rights with respect to an Implementing Technology a) under a royalty-free and otherwise reasonable and non-discriminatory license, or b) under a license that contains reasonable and non-discriminatory terms and conditions, including a reasonable royalty or other payment, or c) without the need to obtain a license from the IPR holder.
>
> The inclusion of licensing information in IPR disclosures is not

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195. Scott Bradner, *Intellectual Property Rights in IETF Technology*, Request For Comment #3979 (Mar. 2005), *available at* http://www.ietf.org/rfc/rfc3979.txt.

196. *Id.* § 8.

197. *Id.*

198. *Id.* § 4(C).

mandatory but it is encouraged so that the working groups will have as much information as they can during their deliberations. If the inclusion of licensing information in an IPR disclosure would significantly delay its submission it is quite reasonable to submit a disclosure without licensing information and then submit a new disclosure when the licensing information becomes available.[199]

199. *Id.* § 6.5.

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NOTES

THE LEARNED INTERMEDIARY DOCTRINE: AN EFFICIENT PROTECTION FOR PATIENTS, PAST AND PRESENT

JENNIFER GIROD*

INTRODUCTION

The learned intermediary doctrine allows manufacturers of prescription drugs to disclose risks to prescribing physicians rather than to the ultimate users of their products. Pharmaceutical companies that do this properly are immune from liability for failure to warn in the event of drug-related accidents.

Arguments to abandon or change the learned intermediary doctrine have increased recently due to perceived fundamental changes in the healthcare environment. The basic argument for altering or abandoning the rule is that it was adopted in response to a paternalistic style of healthcare that no longer exists. Some argue that the requirement of informed consent made the doctrine irrelevant; there is no longer reason to limit warnings to the prescribing physician if the patient is active in the decision making.[1] This line of reasoning rejects the premise that it is most effective to provide prescription drug warnings to physicians rather than to the ultimate users (patients or consumers).

Others argue that the insufficiency (or irrelevance) of the doctrine is more modern, stemming from the significant pressures placed on the professional judgment and autonomy of physicians by direct-to-consumer advertising and managed care.[2] These commentators believe the learned intermediary can be the

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1. Susan A. Casey, *Laying an Old Doctrine to Rest: Challenging the Wisdom of the Learned Intermediary Doctrine*, 19 WM. MITCHELL L. REV. 931, 934 (1993); Teresa Moran Schwartz, *Consumer-Directed Prescription Drug Advertising and the Learned Intermediary Rule*, 46 FOOD DRUG COSM. L.J. 829, 829 (1991).

2. *See, e.g.*, Ozlem A. Bordes, *The Learned Intermediary Doctrine and Direct-to-Consumer Advertising: Should the Pharmaceutical Manufacturer Be Shielded from Liability?*, 81 U. DET. MERCY L. REV. 267, 267-68 (2004); Timothy S. Hall, *Reimagining the Learned Intermediary Rule for the New Pharmaceutical Marketplace*, 35 SETON HALL L. REV. 193, 198 (2004); Paul F. Strain & Christina L. Gaarder, *Direct-to-Consumer Advertising and the Learned Intermediary Doctrine:*

most effective source of patient warnings, but only in certain kinds of healthcare contexts.

The debate rages about how best to serve the goals of tort law in relation to those individuals injured by prescription drugs. Proponents of the traditional application of the learned intermediary doctrine argue that efficiency and patient safety remain best served by adhering to the doctrine. Those advocating a change in the doctrine argue that the learned intermediary doctrine protects pharmaceutical manufacturers at the cost of leaving many plaintiffs uncompensated for drug-related injuries. A stalemate between two positions results: either the learned intermediary doctrine is ineffective because its underlying justifications no longer apply or the underlying justifications have continued relevance *despite* massive changes in the delivery of healthcare. What both sides agree on, however, is that there has been a revolutionary change in healthcare delivery.[3] This Note argues, however, that this assumption is exaggerated; healthcare delivery is not the most relevant facet in assessing the continued vitality of the learned intermediary doctrine.

This Note argues that the learned intermediary doctrine was adopted, primarily, because there was a substantial disparity between the knowledge of the physician and that of the patient. In the context of this knowledge disparity, the learned intermediary doctrine is necessary to serve the tort law goal of accident cost avoidance, which requires the consumer warning to be given to the party in the best position to provide that warning.[4] Patient empowerment and the environment of healthcare delivery have changed the doctor-patient relationship in the last forty years. However, the disparity between physician and patient knowledge endures, and arguably grows, making the learned intermediary doctrine as timely as ever.

Part I of this Note discusses the rationale of the learned intermediary doctrine, its history, and its exceptions. Part II describes arguments that the learned intermediary doctrine should be abrogated completely. Part III describes and challenges arguments that the learned intermediary doctrine should be retained, but should be applied in a way that takes into account fact-specific information about the quality of the doctor-patient relationship and healthcare

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Unsettling a Settled Question, 30 U. BALT. L. REV. 377, 382-83 (2001); Sheryl Calabro, Note, *Breaking the Shield of the Learned Intermediary Doctrine: Placing the Blame Where It Belongs*, 25 CARDOZO L. REV. 2241, 2254-56 (2004); Daniel Richardson, Note, *The Lost Child of Products Liability: New Thoughts about Advertising and the Learned Intermediary Doctrine*, 27 VT. L. REV. 1017, 1018 (2003).

3. Richard C. Ausness, *Will More Aggressive Marketing Practices Lead to Greater Tort Liability for Prescription Drug Manufacturers?*, 37 WAKE FOREST L. REV. 97, 121 (2002) [hereinafter Ausness, *Aggressive Marketing*]. Even Ausness, a staunch supporter of the traditional application of the doctrine, states, "There is no question that these developments [in pharmaceutical advertising and managed care] have changed the traditional physician-patient relationship." *Id.*

4. Richard C. Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information*, 46 SYRACUSE L. REV. 1185, 1226-39 (1996) [hereinafter Ausness, *Learned Intermediaries*].

environment. Part IV defends the learned intermediary doctrine in its current form as the most effective way to serve the goal of providing the best warnings to consumers of prescriptions drugs.

I. THE LEARNED INTERMEDIARY DOCTRINE AND ITS EXCEPTIONS

This section discusses the rationale, the application, and the case law history of the learned intermediary doctrine. In addition, it describes a few of the exceptions that have been carved out in particular jurisdictions relating to mass immunizations, birth control, and (in one case) direct-to-consumer advertising (*Perez v. Wyeth Laboratories, Inc.*[5]).

A. Purpose of the Learned Intermediary Doctrine

The learned intermediary doctrine exists to serve the tort goal of accident cost avoidance, which is accomplished by requiring the consumer warning to be given by the party in the best position to provide that warning.[6] This reflects the realities of the prescription drug market. Individuals who use prescription drugs necessarily interact with a prescribing physician.[7] The physician must receive the warnings about the prescription drugs because he or she will use that information, in the context of the individual patient's medical history, to recommend a course of treatment (or alternative courses of treatment).[8] These warnings will be communicated to the patient through the process of obtaining informed consent or by involving the patient in his or her medical decision-making.[9] This method of communicating warnings to the patient is considered to be the most effective means of passing along this information and should result in the best health outcomes for individual patients.[10]

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5. 734 A.2d 1245 (N.J. 1999).

6. For a clear discussion of these goals, see Ausness, *Learned Intermediaries*, *supra* note 4, at 1226-39. There are three primary goals of tort law: "accident cost avoidance, minimization of administrative costs, and compensation of accident victims." *Id.* at 1226. Whether the goal of minimizing administrative costs is being met is evaluated by looking at both the costs incurred by the manufacturer to determine what they must do to be compliant with the law and the amount of money spent (by all parties) on litigation. *Id.* at 1235-36. Third, and perhaps most importantly, tort law exists for the compensation of accident victims. *Id.* at 1237.

7. There are illegal markets for prescription drugs, including those available through the internet. For a discussion of legal and illegal internet pharmacies, see Hall, *supra* note 2, at 198.

8. Ausness, *Aggressive Marketing*, *supra* note 3, at 109.

9. Laurie K. Marshall, Comment, *Keeping the Duty to Warn Patients of the Risks and Side Effects of Mass-Marketed Prescription Drugs Where It Belongs: With Their Physicians*, 26 U. DAYTON L. REV. 95, 111 (2000) (citing Canterbury v. Spence, 464 F.2d 772, 781-82 (D.C. Cir. 1972)).

10. Ausness, *Learned Intermediaries*, *supra* note 4, at 1233.

B. Application of the Learned Intermediary Doctrine

The majority of jurisdictions apply the learned intermediary doctrine as a duty-oriented rule.[11] Manufacturers know what actions are required to receive immunity from failure to warn claims.[12] This approach serves the policy goal of reducing administrative costs because "an original producer will know in advance that it satisfy [sic] its duty to warn by conveying product safety information to the appropriate intermediary. In contrast, a balancing test will impose significant information costs on many of the parties in the distributive chain."[13] A duty-oriented test decreases litigation costs because defendants can prevail at the summary judgment stage of litigation if they can show they provided adequate warnings to the prescribing physician.[14] A general practice of deciding failure to warn claims on summary judgment motions should "discourage plaintiffs from litigating frivolous claims and . . . give the parties an incentive to settle meritorious ones."[15]

C. Case Law Involving the Learned Intermediary Doctrine and Its Exceptions

Since 1948, courts have recognized that physicians necessarily intervene between pharmaceutical manufacturers and consumers of prescription drugs.[16] The term "learned intermediary" was coined in 1966 in *Sterling Drug, Inc. v. Cornish*.[17] A patient suffered retinal degeneration after taking a drug called Aralan (chlorquine phosphate). The court held that manufacturers had a duty to warn prescribing physicians of side effects, including those suffered only by a very small number of individuals taking the drug.[18] It reasoned that when dealing with prescription drugs:

> the purchaser's doctor is a learned intermediary between the purchaser and the manufacturer. If the doctor is properly warned of the possibility of a side effect in some patients, and is advised of the symptoms normally accompanying the side effect, there is an excellent chance that injury to the patient can be avoided.[19]

It is widely accepted that exceptions to the learned intermediary doctrine should exist for prescription drugs that are dispensed (or likely will be dispensed)

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11. Hall, *supra* note 2, at 217.

12. Ausness, *Learned Intermediaries*, *supra* note 4, at 1224.

13. *Id.* at 1235.

14. *Id.* at 1236-37. The reason defendants can prevail at the summary judgment stage of a trial is because the duty can be determined in advance, which minimizes the need for a jury to weigh evidence.

15. *Id.* at 1236.

16. Marcus v. Specific Pharm., Inc., 77 N.Y.S.2d 508, 510 (Sup. Ct. 1948). For a discussion of this case, see Bordes, *supra* note 2, at 268-69.

17. 370 F.2d 82, 85 (8th Cir. 1966).

18. *Id.* at 85.

19. *Id.*

in the absence of a physician.[20] The most obvious examples of this are found in mass immunization clinics. The 1968 case of *Davis v. Wyeth Laboratories*[21] held that the manufacturer of the Sabin polio vaccine was not protected by the learned intermediary doctrine because it actively participated in designing the immunization clinic, and therefore knew that the prescription drug would be dispensed outside the context of the doctor-patient relationship.[22] "It was dispensed to all comers at mass clinics without an individualized balancing by a physician of the risks involved. In such cases . . . warning by the manufacturer to its immediate purchaser will not suffice[,]" and the manufacturer must directly warn the consumer or ensure that he or she receives an adequate warning.[23]

Reyes v. Wyeth Laboratories[24] extended the logic of Davis to cases in which the manufacturer "had ample reason to foresee" that its product would be "dispensed without procedures appropriate for distribution of prescription drugs."[25] Although Wyeth did not actively participate in the immunization program (in contrast to *Davis*), it should have been familiar with "practices and knowledge common in the drug industry as to distribution and administration of pharmaceutical products."[26] Courts split on whether the exception should apply when a physician administers the vaccine in his or her office (not in a clinic situation).[27]

Some jurisdictions recognize an additional exception to the learned intermediary doctrine for contraceptive prescriptions (both for oral contraceptives and for intrauterine devices (IUDs)).[28] The justification for this exception is different, and more controversial, than that for mass immunizations. A physician is present in these cases, but it is alleged that there is a change in the dynamic of the physician-patient relationship sufficient to abrogate the learned intermediary doctrine. The court in *MacDonald v. Ortho Pharmaceutical Corp.* held that a "manufacturer of birth control pills owes a direct duty to the consumer to warn her of the dangers inherent in the use of the pill."[29] The plaintiff had suffered a stroke as a result of blood clots caused by Ortho's Ortho-Novum oral

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20. Richardson, *supra* note 2, at 1030.

21. Davis v. Wyeth Labs., Inc., 399 F.2d 121 (9th Cir. 1968).

22. *Id.* at 131.

23. *Id.*

24. 498 F.2d 1264 (5th Cir. 1974).

25. *Id.* at 1277.

26. *Id.*

27. For an example of a case that does not apply the exception, see *Hurley v. Lederle Laboratories Division of American Cyanamid Co.*, 863 F.2d 1173, 1178 (5th Cir. 1989). For cases that do apply the exception in this situation, see, for example, *Givens v. Lederle*, 556 F.2d 1341, 1345 (5th Cir. 1977); *Williams v. Lederle Laboratories*, 591 F. Supp. 381, 389 (S.D. Ohio 1984); *Samuels v. American Cyanamid Co.*, 495 N.Y.S.2d 1006, 1008 (Sup. Ct. 1985).

28. For an example of this exception as applied to oral contraceptives, see *MacDonald v. Ortho Pharmaceutical Corp.*, 475 N.E.2d 65, 68 (Mass. 1985). For examples of this exception as applied to IUDs, see *Hill v. Searle Laboratories*, 884 F.2d 1064 (8th Cir. 1989).

29. *MacDonald*, 475 N.E.2d at 68.

contraceptive. Although the drug manufacturer had adequately warned the physician, it had not mentioned the word "stroke" in its literature provided to the patient.[30] The court's reasons for treating oral contraceptives differently than other prescription drugs include two rationales based on the doctor-patient relationship.[31] First, the physician is relatively passive in directing the use of oral contraception to healthy, young women.[32] Second, a healthy woman will often have only annual visits with her healthcare provider. This means that the "patient may only seldom have the opportunity to explore her questions and concerns about the medication with the prescribing physician[,]" and she may not be able to remember the information given by the physician over the full course of one year.[33] The same kind of reasoning applies in the context of the insertion of an IUD.[34] Although this is an accepted exception in some jurisdictions, it remains a minority approach.[35] Most jurisdictions continue to treat these contraceptive prescriptions like prescriptions for other medical conditions, because physicians do make individualized decisions and advise patients based on their unique risk factors. In the case of IUDs, even more physician involvement is required, as the IUD must be ordered and then fitted.[36]

Another possible exception to the learned intermediary doctrine exists when the Food and Drug Administration (FDA) requires inserts in packaging of prescription drug products that are intended for consumers. The logic of this exception is that the manufacturer is already required to communicate warnings directly to consumers, so the learned intermediary doctrine serves no purpose.[37]

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30. It had, however, described the possibility of "increased risk to pill users that vital organs such as the brain may be damaged by abnormal blood clotting." *Id.* at 67.

31. The court also relied on the fact that the FDA extensively regulates birth control and mandates that end users should have detailed, clear, and readily accessible information of their risks. *Id.* at 70.

32. *Id.* at 69.

33. *Id.*

34. *See* Hill v. Searle Labs., 884 F.2d 1064, 1071 (8th Cir. 1989).

35. For the traditional approach to the learned intermediary doctrine in oral contraceptive cases, see *Reaves v. Ortho Pharmaceutical Corp.*, 765 F. Supp. 1287, 1290-91 (E.D. Mich. 1991); *Goodson v. Searle Laboratories*, 471 F. Supp. 546, 549 (D. Conn. 1978); *West v. Searle & Co.*, 806 S.W.2d 608, 614 (Ark. 1991); *Cobb v. Syntex Laboratories, Inc.*, 444 So. 2d 203, 205 (La. Ct. App. 1983); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 549-50 (Ind. App. 1979); *Taurino v. Ellen*, 579 A.2d 925, 928 (Pa. Super. Ct. 1990). For the traditional approach applied to IUDs, see *Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992); *Allen v. G.D. Searle & Co.*, 708 F. Supp. 1142, 1148 (D. Or. 1989); *Kociemba v. G.D. Searle & Co.*, 680 F. Supp. 1293, 1305-06 (D. Minn. 1988); *Spychala v. G.D. Searle & Co.*, 705 F. Supp. 1024, 1032 (D. N.J. 1988); *Humes v. Clinton*, 792 P.2d 1032, 1042-43 (Kan. 1990); *Lacy v. G.D. Searle & Co.*, 567 A.2d 398, 401 (Del. 1989); *Terhune v. A.H. Robins Co.*, 577 P.2d 975, 979 (Wash. 1978).

36. *See, e.g.*, *West*, 806 S.W.2d at 614 (applying this reasoning to oral contraceptives); *Lacy*, 567 A.2d at 401 (applying this reasoning IUDs).

37. For an example of this reasoning, see *Edwards v. Basel Pharmaceuticals*, 933 P.2d 298, 303 (Okla. 1997) (holding that "when the FDA requires warnings be given directly to the patient

Therefore, the consumer warnings should be assessed according to common law principles. Again, this exception remains a minority position, and most jurisdictions continue to apply the learned intermediary doctrine in these cases.[38]

Perez v. Wyeth Laboratories, Inc. provides an exception to the learned intermediary doctrine for products that have been directly marketed to consumers.[39] In 1998, the Restatement (Third) of Torts emphasized that the learned intermediary doctrine still protects pharmaceutical manufacturers from liability when they have adequately warned prescribing physicians.[40] However, it asserts in section 6(d)(2) that the patient herself must be adequately warned "when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings."[41] The Restatement declined to elaborate more fully than that, pointing to "developing case law" to determine whether this exception should apply in the context of direct-to-consumer advertising.[42] *Perez* concluded that it should.[43]

A group of bellwether plaintiffs filed suit against Wyeth Laboratories for failure to warn about the side effects of Norplant, a birth control drug/device. Plaintiffs suffered a wide variety of side effects, including weight gain, nausea, high blood pressure and scarring during the removal of the capsules.[44] The superior court determined that the learned intermediary doctrine would apply in this case, despite the fact that Wyeth had directly marketed its product to consumers.[45] "[E]ven when a manufacturer advertises directly to the public, and a woman is influenced by the advertising campaign, 'a physician is not simply relegated to the role of prescribing the drug according to the woman's wishes.'"[46]

The Supreme Court of New Jersey analyzed the issue differently, and reversed the lower court. The court framed the question in light of assumptions about the changed practice of medicine. In its introduction, it stated, "Our medical-legal jurisprudence is based on images of health care that no longer

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with a prescribed drug, an exception to the 'learned intermediary doctrine' has occurred, and the manufacturer is not automatically shielded from liability by properly warning the prescribing physician").

38. *See, e.g.*, Harrison v. Am. Home Prods. Corp. (*In re* Norplant Contraceptive Prod. Liab. Litig.), 165 F.3d 374, 379-80 (5th Cir. 1999); MacPherson v. Searle & Co., 775 F. Supp. 417, 424-25 (D.D.C. 1991); Spychala v. G.D. Searle & Co., 705 F. Supp. 1024, 1033 (D.N.J. 1988); Martin v. Ortho Pharm. Corp., 661 N.E.2d 352, 356-57 (Ill. 1996).

39. Perez v. Wyeth Labs, Inc., 734 A.2d 1245, 1257 (N.J. 1999).

40. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6(d)(1) (1998).

41. *Id.* § 6(d)(2).

42. *Id.* § 6 cmt. e.

43. *Perez*, 734 A.2d at 1257-58.

44. *Id.* at 1248.

45. *Id.* at 1249.

46. *Id.* (quoting Perez v. Wyeth Labs., Inc., 713 A.2d 588 (N.J. Super. Ct. Law Div. 1997), *rev'd*, 734 A.2d 1245 (1999)).

exist."[47] According to the court, there was a time in which physicians saw their patients in their offices and made house calls, and patients paid their (small) bills directly to their doctor. The legal profession assumed that the "doctor knows best."[48] In addition, pharmaceutical companies "never advertised their products to patients."[49] This was the "comforting setting" that justified the learned intermediary doctrine.[50] However, the court noted that, "that has all changed."[51]

In contrast to this idyllic vision of the traditional practice of medicine, the court pointed to changes toward corporate medicine, in which managed care organizations provide services, and prescriptions are prepared in grocery stores, and manufacturers advertise their prescription drugs directly to consumers.[52] Therefore, it framed the question of responsibility for the plaintiffs' injuries, in light of its understanding of this revolution, as "whether our law should follow these changes in the marketplace or reflect the images of the past."[53]

The court determined that the learned intermediary doctrine should not shield Wyeth from liability for failure to warn even though Norplant is available only by prescription and the capsules that deliver the active hormone, Levonorgestrel, are placed under the patient's skin by a physician.[54] Rather, it decided that the learned intermediary doctrine should not apply "when mass marketing of prescription drugs seeks to influence a patient's choice of a drug."[55] The court reached this conclusion because it determined that the premises upon which the learned intermediary doctrine is based are "absent in the direct-to-consumer advertising of prescription drugs."[56] The court cited as its first reason for creating this exception that "with rare and wonderful exceptions, the 'Norman Rockwell' image of the family doctor no longer exists."[57] Informed consent requirements are one facet of the doctor-patient relationship the court feels has substantially changed. Second, physicians cannot provide adequate information to patients about prescription drugs because "managed care has reduced the time

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47. *Id.* at 1246.

48. *Id.* at 1247 (citing Logan v. Greenwich Hosp. Ass'n, 465 A.2d 294, 299 (Conn. 1983)).

49. *Id.* at 1249.

50. *Id.* at 1247.

51. *Id.*

52. *Id.* It is difficult to see exactly what the court means here; managed care organizations do not provide care. Physicians still provide care to patients, even if that care is organized through and paid for by managed care organizations. In addition, it is difficult to see the relevance of the fact that prescriptions would be prepared in a supermarket as opposed to a corner pharmacy; pharmacists are employed in both settings. However, it does seem that the court is bothered by its perception that profit-motivated groups are intervening in an intimate relationship between physician and patient.

53. *Id.*

54. *Id.* at 1247, 1268.

55. *Id.* at 1247.

56. *Id.* at 1255.

57. *Id.* (quoting Lars Noah, *Advertising Prescription Drugs to Consumers: Assessing the Regulatory and Liability Issues*, 32 GA. L. REV. 141, 160 n.78 (1997)).

allotted per patient."[58] Finally, direct to consumer advertising and its profits undermine the premise that "drug manufacturers lack effective means to communicate directly with patients."[59] Because the underlying premises are allegedly inapposite, the "common law duty to warn the ultimate consumer should apply."[60]

The direct-to-consumer-advertising exception has not yet been adopted in other jurisdictions,[61] and it is has been questioned by at least one other court in New Jersey. For instance, in a 2003 decision, *New Jersey Citizen Action v. Schering-Plough Corp.*,[62] the court dismissed a claim for fraudulent advertising for the prescription allergy medication, Claritin.[63] In dicta, the court (affirming the lower court's judgment) stated that, regardless of the *Perez* holding, "the intervention by a physician in the decision-making process necessitated by his or her exercise of judgment whether or not to prescribe a particular medication protects consumers in ways respecting efficacy that are lacking in advertising campaigns for other products."[64]

Perez is a substantial expansion in reasoning for exceptions to the learned intermediary doctrine. It does not assume the absence of a physician (like the immunization cases) nor does it look at the relative involvement of the patient and physician in the decision to use a particular prescription drug or device (like the cases involving birth control). Rather, it concludes that the current overall environment in which healthcare is practiced, with managed care and direct-to-consumer pharmaceutical advertising, renders physicians incompetent to act as learned intermediaries. If true, this could warrant a radical reconfiguration of failure-to-warn jurisprudence for prescription drugs.

There are three basic proposals for changing the traditional application of the learned intermediary doctrine. The first option is to follow the courts which have carved out exceptions for certain kinds of cases. These range from creating an exception for mass immunizations in the absence of a physician (widely adopted) to an exception for prescriptions given when there has been direct-to-consumer advertising (adopted only in New Jersey).[65] However, some scholars argue that an extended list of exceptions to a doctrine suggests that the doctrine has become outdated and should be changed. As one scholar states, "[E]ventually, the law must ask whether it would not be more appropriate to revise the rule itself to eliminate the need for the exceptions, rather than continuing to create bright-line

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58. *Id.*

59. *Id.* The court also notes a fourth premise, the "complexity of the subject," which it states may possibly still be relevant. *Id.*

60. *Id.* at 1256.

61. Bernard J. Garbutt III & Melinda E. Hofmann, *Recent Developments in Pharmaceutical Products Liability Law: Failure to Warn, the Learned Intermediary Defense, and Other Issues in the New Millennium*, 58 FOOD & DRUG L.J. 269, 275 (2003).

62. 842 A.2d 174 (N.J. Super. Ct. App. Div. 2003).

63. Claritin is now available as an over-the-counter medication.

64. *N.J. Citizen Action*, 842 A.2d at 177-78.

65. *See* discussion of cases accompanying *supra* notes 17-39.

exceptions to the rule."[66] A discussion of two such revisions follows.

II. ABOLISHING THE LEARNED INTERMEDIARY DOCTRINE

One proposal is to abolish the learned intermediary doctrine completely so that prescription drugs are treated like any other product.[67] In traditional products liability, manufacturers are responsible for warning the end users of their products of foreseeable dangers.[68] An exception was created for prescription drugs because of the difficulties associated with effectively reaching the intended, nonmedical audience with adequate warnings.[69] There are two basic arguments for abolishing the learned intermediary doctrine and requiring prescription drug manufacturers to warn consumers directly. First, patients are educated and empowered and no longer need a learned intermediary. Second, direct-to-consumer advertising itself undercuts assumptions upon which the doctrine arguably rests, including the inability to reach consumers, the need for the physician to be the sole source of patient information, and the desire courts have not to intrude on the doctor-patient relationship.[70]

A. Patients Are Educated and Empowered

The first rationale for abrogating the learned intermediary doctrine is that consumers are capable of understanding information directly from manufacturers and do not need the intervention of a physician to understand warnings. One version of this argument is that the concept of informed consent itself renders the learned intermediary doctrine irrelevant. Susan A. Casey asserts that "[t]he single most important argument in favor of direct-to-patient warnings is the notion of informed consent."[71] Informed consent requires physicians to "respect . . . the patient's right of self-determination," which requires a disclosure of risks and benefits that a reasonable person would need to know to make a choice based upon his or her own values.[72] Casey argues that "in the case of drugs and devices, both the physician and the manufacturer are qualified to disclose material information regarding risks and adverse effects."[73] If this is true, then a patient can arrive at informed consent to take a prescription drug merely by reading the warnings provided by the manufacturer. The physician's involvement is a vestige of medical paternalism,[74] and the patient should not be

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66. Hall, *supra* note 2, at 240.

67. Bordes, *supra* note 2, at 268; Casey, *supra* note 1, at 959.

68. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

69. *Id.* § 402A cmt. k.

70. There are minor variations in different summaries of justifications for the learned intermediary doctrine. This list is consistent with the analysis in *Perez*, which, in turn, bases its reasoning on the arguments that follow in this section.

71. Casey, *supra* note 1, at 958.

72. *Id.* (quoting Canterbury v. Spence, 464 F.2d 772, 784 (D.C. Cir. 1972)).

73. *Id.* at 959.

74. *Id.* at 958.

"needlessly subjected to the physician's or the courts' discretion."[75]

Another version of this argument rests on the assumption that patients are adequately educated to understand direct warnings because they receive information from drug companies via advertising and because they learn about medicine via the internet and other sources. The court in *Perez* relied on an early formulation of this argument that asserted that advertising had changed the relative roles of the physician and patient in medication decisions.[76] By directly providing consumers with information about their products, manufacturers "enabl[ed] consumers to be more actively involved in making decisions about prescription drugs."[77] The physician's role is diminished, although it is still vital because a prescription remains necessary to purchase these drugs. Therefore, the "legal principles applicable to other product sellers should apply equally to prescription drug manufacturers who advertise their products."[78] This argument implies that the direct-to-consumer advertising for pharmaceutical products is capable of providing effective education and information to consumers, and that the pharmaceutical manufacturer displaces the physician as the best person to warn.

These arguments are flawed because they mischaracterize the role of the educated patient in a healthcare encounter. The "root premise" for the legal concept of informed consent in healthcare has existed in the United States since 1914, when the court in *Schloendorff v. Society of New York Hospital*[79] declared that "every human being of adult years and sound mind has a right to determine what shall be done with his own body."[80] The doctrine was entrenched as "almost axiomatic" by the time *Canterbury v. Spence* was decided in 1972.[81] The court in *Canterbury* states,

> True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision.[82]

The physician is therefore obligated to disclose to the patient the material risks and benefits that would enable a reasonable person to make an educated decision.[83] Material information includes "inherent and potential hazards of the

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75. *Id.* at 959.

76. Schwartz, *supra* note 1, at 844. The *Perez* court relies on her argument in its decision. *See* Perez v. Wyeth Labs, Inc., 734 A.2d 1245, 1255 (N.J. 1999).

77. Schwartz, *supra* note 1, at 844.

78. *Id.* at 845.

79. 105 N.E. 92, 93 (N.Y. 1914).

80. *Id.* (quoted in Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972)).

81. *Canterbury*, 464 F.2d at 780.

82. *Id.*

83. *Id.* at 787. This is the more rigorous standard. Another legal standard is based on

proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated."[84]

Informed consent depends on a partnership between the doctor and the patient. That partnership is unequal in terms of medical expertise, but equal in terms of moral authority. The doctor brings to the healthcare encounter his or her expertise, acquired through a decade or more of classroom education and clinical training, which requires the application of "textbook" knowledge to each individual patient. Very rarely is there equality of medical knowledge between the doctor and the patient.[85]

The context of healthcare decision making, then, is one in which the doctor describes the options and likely results of therapeutic options (or of doing nothing), and then the patient chooses based on his or her own values. For instance, a patient with prostate cancer can choose between medical management and different types of surgical techniques. To make an informed decision, the patient needs to know rates of success and which complications potentially accompany which treatments. One patient, based on his particular life circumstances, may choose a surgery that has a very high likelihood of eradicating the cancer completely, but carries with it a higher chance of impotency. Another patient with the exact same disease may, for other reasons, choose medical management, with a lower rate of success. Physicians are not paternalistic as long as they do not substitute their value judgments for those of their patients.[86]

Therefore, informed consent diminishes neither the need for medical expertise nor for the learned intermediary doctrine. The court in *Terhune v. A.H. Robins Co.*[87] makes it clear that requiring the patient to make an informed decision does not invalidate the learned intermediary doctrine, because "[i]n any such situation which may come to mind, the patient is expected to look to the physician for guidance and not to the manufacturer of the products which he may use or prescribe in the course of treatment."[88]

The argument, therefore, that the doctrine of informed consent somehow

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professional custom. *Id.* at 783. The court in *Canterbury* found this standard insufficiently strong and susceptible to manipulation by physician witnesses. *Id.* at 783-84.

84. *Id.* at 787-88.

85. A reasonable argument can be made that doctors and patients are equal in knowledge in certain limited situations, such as a decision for a healthy, young woman to take birth control pills. Both the physician and the patient (by reading literature provided by the manufacturer) may be able to understand the risks equally well. This is the argument that the court advances in *MacDonald v. Ortho Pharmaceutical Corp.*, 475 N.E.2d 65, 69-70 (Mass. 1985).

86. JAMES F. CHILDRESS, WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE 13 (1982) (stating that paternalism is a "refusal to accept or to acquiesce in another person's wishes, choices, and actions for that person's own benefit").

87. 577 P.2d 975 (Wash. 1978).

88. *Id.* at 978. The court states, "The fact that the patient makes the final choice among suggested contraceptives (or decides not to use any at all) does not constitute a distinction which makes the general rule inapplicable." *Id.*

renders the learned intermediary doctrine irrelevant must fail. An informed patient judgment is possible only after a physician discloses the material medical information. If the physician was required to do this for pharmaceutical products in 1966, it remains necessary today.

B. Direct-to-Consumer Advertising Undercuts Rationales for the Learned Intermediary Doctrine

Serious problems also plague the argument that direct-to-consumer advertising destroys the presumptions upon which the learned intermediary doctrine is based.

1. Pharmaceutical Manufacturers Can Reach Consumers.—Commentators argue that the learned intermediary doctrine was adopted because pharmaceutical manufacturers were incapable of reaching consumers and that direct-to-consumer advertising has changed that assessment. Some scholars have suggested that drug companies can effectively reach patients because their advertising campaigns are so successful. For example, the court in *Perez* argued that, "having spent $1.3 billion on advertising in 1998, drug manufacturers can hardly be said to 'lack effective means to communicate directly with patients,' when their advertising campaigns can pay off in close to billions in dividends."[89] The court in *Perez* relied on Lars Noah's assessment when refusing to apply the learned intermediary doctrine in its groundbreaking decision.[90]

Although advertising may increase sales, it remains true that it is virtually impossible for pharmaceutical manufacturers to provide a warning to specific patients based on their unique medical history and condition and the constellation of other drugs they may be taking.[91] The near impossibility of providing specific warnings remains even though these manufacturers clearly "reach" consumers. The ability to "reach" consumers in the sense of providing them with prescription drug information sufficient to entice them to request a product does not guarantee that the information is tailored to their physiological needs. Direct-to-consumer advertising therefore does not abrogate the need for the learned intermediary doctrine solely because it provides an effective channel for reaching patients.

2. Physician Must Be Sole Source of Information.—At least one commentator contends that the learned intermediary doctrine is only valid if the physician is the sole source of patient information.[92] It is therefore invalid if the

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89. Perez v. Wyeth Labs., Inc., 734 A.2d 1245, 1255 (N.J. 1999) (quoting Noah, *supra* note 57, at 158) (internal citations omitted).

90. *Id.* at 1255-56.

91. Ausness, *Aggressive Marketing*, *supra* note 3, at 108-10. It is "virtually impossible for a manufacturer to test a new chemical entity with every other medication that might create an adverse interaction." For this reason, warnings are added after adverse, unforeseen drug interactions. Barbara A. Noah, *Adverse Drug Reactions: Harnessing Experiential Data to Promote Patient Welfare*, 49 CATH. U. L. REV. 449, 491 (2000).

92. *See, e.g.*, Schwartz, *supra* note 1, at 842. Schwartz states, "The learned intermediary rule is based on the notion that the doctor should be the sole source of information about prescription

consumer has been exposed to any direct-to-consumer-advertising (or other forms of information, including word of mouth), whether or not that information effectively conveys warnings.

However, there is nothing in the doctrine itself that suggests that a physician can act as a learned intermediary only when he or she is the sole source of patient information. Courts do not require this when they apply the learned intermediary doctrine.[93] In *Davis v. Wyeth*,[94] for instance, the court held that the decision to prescribe a particular drug is essentially a medical one, but it does not state that the patient cannot be influenced by any other sources.[95] In *Thomas v. Hoffman-La Roche, Inc.*,[96] the court held that "the physician through education, experience, and specialized training is in the best position to make a benefit/risk analysis in making the determination to prescribe a particular drug for a specific patient."[97] Also, in *Terhune v. A.H. Robins Co.*,[98] the court held that "[t]he patient is expected to and, it can be presumed, does place primary reliance upon [the physician's] judgment."[99] The physician's expertise is still needed, even if there are other sources of patient information. The underlying fact that physicians tailor manufacturer warnings to individual patients does not change, regardless of how many other sources of information a patient may have.

3. Direct-to-Consumer Advertising ("DTCA") Purposefully Interferes with the Doctor-Patient Relationship.—A third argument is that the learned intermediary doctrine should be eliminated because it exists in part to preserve the doctor-patient relationship, but pharmaceutical companies intentionally intrude on this relationship through their aggressive advertising campaigns. Fairness should therefore prevent those companies from relying on the learned intermediary doctrine as a shield against failure to warn liability.[100] This argument has common sense appeal and "is a powerful argument if one believes that the primary purpose of the learned intermediary rule is to benefit pharmaceutical companies at the expense of consumers."[101] However, it fails to relate to the purpose of the learned intermediary doctrine, which is to protect consumers at the lowest cost. "[I]f the primary beneficiaries of the learned intermediary rule are consumers, and not drug companies, then the conduct of

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drugs. Consumer-directed advertising, however, completely undercuts that notion." *Id.* at 842.

93. This is true even in the cases Schwartz uses to present her argument. *Id.* at 830 n.5.

94. Davis v. Wyeth Labs., Inc., 399 F.2d 121 (9th Cir. 1968).

95. *Id.* at 130 (holding that "the choice involved is essentially a medical one involving an assessment of medical risks in the light of the physician's knowledge of his patient s needs and susceptibilities. Further it is difficult under such circumstances for the manufacturer, by label or direct communication, to reach the consumer with a warning." Therefore, the physician's warning "is in such cases the only effective means by which a warning could help the patient.")

96. Thomas v. Hoffman-La Roche, Inc., 731 F. Supp. 224 (N.D. Miss. 1989).

97. *Id.* at 229.

98. Terhune v. A.H. Robins Co., 577 P.2d 975 (Wash. 1978).

99. *Id.* at 978-79.

100. *See, e.g.*, Bordes, *supra* note 2, at 268.

101. Ausness, *Aggressive Marketing*, *supra* note 3, at 122.

drug companies should not necessarily determine whether the rule should be retained or not."[102]

III. APPLYING THE LEARNED INTERMEDIARY DOCTRINE AS A FACT-BASED INQUIRY

Rather than arguing that it is more effective in terms of the tort law goal of accident cost avoidance to warn consumers directly (as the first set of proposals did), the proposals in this section assume that warnings to physicians can be the most efficient way to protect consumers, but only in cases where the physician is not overly constrained by pressures of the modern healthcare environment. Therefore, a fact-based inquiry into the context of the provision of the prescription medication is required to determine whether the learned intermediary doctrine should be available to pharmaceutical manufacturers as a defense to liability. The logic, in part, is that pharmaceutical companies are not exempt from failure to warn liability when they have reason to believe the physician will not be in a position to reduce risk.

The main implication for litigation of this kind of fact-based inquiry is that it would be more difficult for defendants to win at the summary judgment stage of litigation because evidence regarding specific advertising, a patient's contact with that advertising, and the relationship of the patient and physician would be factual matters best evaluated by a jury. In addition, a factor-balancing approach opens up the number of potential defendants available to suit; it "extends liability to parties farther down the distributive chain without necessarily relieving parties who are farther up the chain."[103] Therefore, this approach might compensate victims better, but the costs of accident avoidance and administration would increase.[104]

Proposals that depend upon skepticism about the doctor-patient relationship vary in their details, although common themes include a loss of the paternalistic, dyadic doctor-patient relationship and negative effects of direct-to-consumer advertising and managed care. This section will examine two of these proposals and their assumptions. It will then turn in more detail to widespread concerns about the effects of direct-to-consumer advertising and managed care on physicians' ability to function effectively as learned intermediaries.

A. Proposals for and Assumptions of Fact-Based Analyses

Timothy S. Hall offers an alternative to the learned intermediary doctrine which "bring the law's presumptions into line with the modern health care marketplace."[105] Hall suggests that the text of the learned intermediary doctrine should itself be changed, and courts should apply it by weighing various

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102. *Id.*

103. Ausness, *Learned Intermediaries*, *supra* note 4, at 1239.

104. *Id.* at 1237.

105. Hall, *supra* note 2, at 199.

factors.[106] The doctrine he suggests is:

> A manufacturer has the duty to warn the ultimate user of an unavoidably unsafe product, notwithstanding the fact that the product is sold to an intermediary or that the product is legally unobtainable without recourse to an intermediary. A manufacturer may discharge its duty to warn by warning only the intermediary when it knows or has reason to know that the intermediary is in a position to minimize the risk posed by the product.[107]

The factors Hall proposes that the courts weigh when making the determination of the doctor's ability to minimize risk encompass all of the exceptions adopted by jurisdictions throughout the country and others that arguably influence the prescription process now and in the future.[108] He includes: (1) the absence or presence of a prescribing physician; (2) whether the patient "specifically requested" a particular drug; (3) the ability (or inability) for the patient to regularly and frequently discuss the drug's efficacy; (4) whether the drug treats a medical condition or is cosmetic or used for convenience; and (5) whether regulations insist that the consumer be directly warned about side effects and adverse reactions.[109]

Hall believes the learned intermediary doctrine should be changed because of "the change (some would say the decline) from the fee-for-service health care system of that time [circa 1966] with its emphasis on the dyadic, paternalistic physician-patient relationship, to the modern, twenty-first century health care system with its triadic managed care relationships and uncertain authority structure."[110] Hall describes his vision of what the healthcare world was like in 1966 when the learned intermediary doctrine was adopted.[111] "President Lyndon Johnson was in the White House and Dr. Kildare was on television. Dr. Kildare, like Marcus Welby, who followed him, remains an icon of the traditional American health system: a primary care physician devoted to his patients."[112] The learned intermediary doctrine should be changed because the fee-for-service payment and "dyadic, paternalistic physician-patient relationship" has been replaced.[113]

Sheryl Calabro's proposal is that the learned intermediary doctrine should remain essentially unchanged, but that it should be applied in a fact-based way, requiring the court to assess the context of the doctor-patient relationship.[114] Calabro's proposal is that the Rule should apply when the "root justifications for

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106. *Id.*
107. *Id.* at 242.
108. *Id.* at 243.
109. *Id.*
110. *Id.* at 195.
111. *Id.*
112. *Id.*
113. *Id.*
114. Calabro, *supra* note 2, at 2308.

the learned intermediary doctrine are present,"[115] but that it should not be used when there are significant conflicts of interest due to pharmaceutical advertising and managed care that "undermine the ability of the physician to make independent determinations concerning the patient's well-being and to function as a learned intermediary."[116] The court would need to determine this by applying a "flexible framework."[117] There would be four major factors to consider, and the list would not be exhaustive. Those four factors are:

> (1) whether and to what extent the pharmaceutical company has engaged in direct-to-consumer advertisement and the breadth and nature of that advertising; (2) whether the pharmaceutical company has repeatedly encouraged physicians to prescribe their products through gifting and other aggressive marketing practices; (3) whether and how the pharmaceutical company has made its products available through Internet pharmacies; and (4) whether the traditional physician-patient relationship exists.[118]

After evaluating these factors, the "courts should then balance the equities."[119]

Like Hall, Calabro notes a change in the doctor-patient relationship. She states, "When the learned intermediary doctrine developed, the physician and patient had a professional relationship guided by ethical and fiduciary responsibilities. The physician, driven by the Hippocratic Oath, did not encounter the countervailing pressures that exist today, nor was the consumer inundated with information communicated directly from the pharmaceutical manufacturer."[120]

1. Questioning the Assumptions.—Taken together, these two proposals suggest three features of modern medicine that could adversely affect the physician's ability to serve as a learned intermediary. The first is that physicians are more distant from their patients and arguably less motivated by altruism than they were in the 1960s (and before). The second is that managed care makes physicians less trustworthy than they were under fee-for-service payment arrangements due to certain payment incentive structures. The third is that direct-to-consumer advertising creates conflicts between the physician and the patient that diminish the quality of the physician's care. These arguments deserve careful scrutiny. Which, if any, are true? If they are true, would the alteration of the learned intermediary ameliorate any of the problems?

a. Changes in the doctor-patient relationship.—There is some general truth to Hall's depiction of the traditional doctor-patient relationship, although major changes in that relationship were well underway before the adoption of the learned intermediary doctrine. Although Norman Rockwell's depictions of

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115. *Id.* at 2306.
116. *Id.* at 2259.
117. *Id.* at 2306.
118. *Id.*
119. *Id.* at 2309.
120. *Id.* at 2253.

physicians were nostalgic, the old-fashioned family doctor was the norm rather than the exception before World War II. Seventy percent of physicians were still family practitioners in 1940.[121] Physicians lived in the communities where they worked, and shared the religion and worldview of their patients. "The critical elements in building a practice were not degrees, specialty certification, hospital affiliation, or special skills."[122] Rather, one's reputation in the neighborhood attracted patients.[123] In addition, case history was the main component of diagnosis, because there were few other diagnostic tools. Physician practice was improved by knowing the patient well.[124] Therefore, people had closer relationships with their physicians, and physicians "were comfortable making decisions on behalf of the patients."[125]

However, this relationship changed drastically after World War II. Twenty percent of physicians were general practitioners, house calls virtually disappeared, and specialty practice ensured that physicians obtained patients based on technical expertise rather than people skills.[126] In fact, "specialization meant that patients and doctors were not likely to have met before the onset of the illness, let alone to have developed a relationship."[127] Physicians' incomes increased, which "helped foster belief that doctors had become more concerned with their pocketbooks than their patients."[128] More important, however, was the increased distance between physicians and their patients caused by their extended training.[129]

Physicians, therefore, became less paternalistic. This took place before the adoption of the learned intermediary doctrine and was the result of specialization as opposed to physicians caring less about their patients. The courts that recognized and coined the "learned intermediary" doctrine would have been aware of this massive change in the doctor-patient relationship, so it is unlikely that the learned intermediary doctrine depends on such the paternalistic relationship. When the doctor-patient relationship was paternalistic, the doctor could substitute his or her value judgments for those of the patient because they knew each other well and shared the same value system. This Note argues, however, that the learned intermediary doctrine does not depend on paternalism for its relevancy; instead, it depends on expertise.[130] The changes since the

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121. DAVID J. ROTHMAN, STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION MAKING 114 (1991).

122. *Id.* at 117.

123. *Id.*

124. *Id.*

125. *Id.* at 123.

126. *Id.* at 128-29.

127. *Id.* at 129.

128. *Id.* at 108.

129. *Id.* at 134. "[W]hen physicians earn the requisite degrees and pass the national and specialty board exams, they have spent some fifteen years since high school on the training track, most of this time, segregated in a medical world."

130. See the discussion on informed consent, *supra* Part II.A.

doctrine was adopted only increase physician expertise and make the doctrine's justification stronger.

What about the claim that physicians are no longer altruistic and cannot be trusted to put their patients' concerns over their own? First, it is highly simplistic to say that physicians were once bound by the Hippocratic Oath, but currently are not. The Hippocratic Oath has many admirable suggestions, such as to "come for the benefit of the sick" and to guard confidences.[131] It also, however, has problematic counsel (as we would expect from a Greek, cultic group from 4 B.C.E.), such as the prohibition against surgery and abortion.[132] The Hippocratic Oath is only one possible oath that could be said to influence physician ideals.[133] American physician (and signer of the Declaration of Independence) Benjamin Rush counseled heroicism for physicians in 1801.[134] "Rush's ideal physician . . . would never refuse to treat patients because of poverty, or exploit their vulnerability. Indeed, the virtuous physician was heroic: should a plague strike a community, the physician was obliged to stay and treat the ill, even at the risk of death."[135] However, being human beings, one can safely assume that all doctors were not heroes, and much of the professional ethics literature written by physicians during this "golden age" of the doctor-patient relationship focused on physician interests. For example, in the mid-1920s, Richard Cabot was analyzing the ethical aspects of fee-splitting, and in the 1930s the American Medical Association was busy lobbying against "national health insurance, group practice, and physician advertising."[136]

From a historical perspective, it is inaccurate to argue that the learned intermediary doctrine was adopted because physicians were perfectly virtuous in the 1960s. There has been a decrease in the intimacy between physicians and patients, but physicians were and are not perfectly virtuous. Luckily, the learned intermediary doctrine never depended on perfect virtue; instead, it depended on physician expertise.

b. Direct-to-consumer advertising.—Direct-to-consumer advertising increased dramatically in the 1990s, rising "from a meager $55 million in 1991 to $2.5 billion in 2000."[137] A widely cited yearly survey in *Prevention*

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131. *The Oath of Hippocrates*, MEDWORD RESOURCES, http://www.medword.com/hippocrates.html (last visited Mar. 13, 2007).

132. Fabrice Jotterand, *The Hippocratic Oath and Contemporary Medicine: Dialectic Between Past Ideals and Present Reality?*, 30 J. MED. & PHIL. 107, 110-11 (2005).

133. Currently, medical students commonly only recite one-third of the Oath at their medical school graduations. *Id.* at 110.

134. Rush was a physician in Philadelphia. Rothman says, "Rush's ideal physician was not pecuniary minded; recognizing an ongoing obligation to the poor. . . ." ROTHMAN, *supra* note 121, at 103.

135. *Id.*

136. *Id.* at 104.

137. Marta Wosinska, *Just What the Patient Ordered? Direct-to-Consumer Advertising and the Demand for Pharmaceutical Products* 1 (Harvard Bus. Sch. Mktg. Research Papers, Paper No. 02-04, 2002), *available at* http://ssrn.com/abstract_id=347005.

magazine[138] reported that "29% of consumers who saw a drug ad talked to their physician about it and asked for the drug to be prescribed to them. Doctors, in turn, honored 73% of those consumer requests."[139] A heated debate about the potential effects of direct-to-consumer advertising on patients and the costs of healthcare ensued.

Proponents of direct-to-consumer advertising suggest three beneficial results for patients. First, patients can learn to describe their symptoms more effectively by hearing the advertisements, thus improving their communications with their physicians.[140] Second, individuals who previously were not under a doctor's care visited a physician for the first time for previously untreated chronic conditions such as obesity, hypertension, high cholesterol and depression.[141] Third, drug advertising can serve as a patient reminder, which can improve patient compliance.[142] Noncompliance is one of the most serious problems with drug therapies, contributing to as many as 125,000 deaths per year in the United States.[143] It also causes increased hospitalizations.[144] Direct-to-consumer advertising can therefore provide substantial health benefits for patients.

Many commentators in both the law and medicine were not so optimistic about direct-to-consumer advertising's benefits for patients and the community. Many of the arguments by legal commentators who advocate a change in the learned intermediary doctrine in the presence of direct-to-consumer advertising are shared by those who would like to abolish the doctrine completely. For instance, these commentators complain that increases in advertising "leav[es] the pharmaceutical company without the excuse that it could not communicate directly with consumers."[145] This Note argues that direct-to-consumer advertising does not "reach" consumers with adequate warnings, even if it could be shown that it translates into prescription drug sales.[146] In addition, there is concern that direct-to-consumer advertising changes the relative positions of decision making power in the doctor-patient relationship.[147] If the patient initiates a treatment by requesting a particular drug, then the physician is not

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138. *International Survey on Wellness and Consumer Reaction to DTC Advertising of Prescription Drugs*, PREVENTION MAG. 46-55 (2001).

139. Wosinska, *supra* note 137, at 1.

140. Michael C. Allen, Comment, *Medicine Goes Madison Avenue: An Evaluation of the Effect of Direct-to-Consumer Pharmaceutical Advertising on the Learned Intermediary Doctrine*, 20 CAMPBELL L. REV. 113, 127-28 (1997).

141. Alan F. Holmer, *Direct-to-Consumer Advertising—Strengthening Our Health Care System*, 346 NEW ENG. J. MED. 526, 528 (2002).

142. Dorothy L. Smith, *DTC Ads: Promoting Compliance a Win-Win Prospect*, 19 PHARMACEUTICAL EXECUTIVE 84 (1999).

143. Mary Wosinska, *Direct-to Consumer Advertising and Drug Therapy Compliance*, 42 J. MARKETING RES. 323, 323 (2005).

144. *Id.*

145. Calabro, *supra* note 2, at 2270.

146. *See supra* Part II.B.1.

147. Schwartz, *supra* note 1, at 844.

exercising his or her expertise.

One commentator points out the obvious fact that pharmaceutical advertising is an attempt to sell products rather than to educate consumers.[148] These advertisements are created based on "intensive research . . . [into] consumer purchasing psychology."[149] Therefore, the consumer will approach the physician with a strong desire for a product that may or not be appropriate, and thus will exert a "shadow pressure" on the physician.[150] The physician is then in the position where he or she is "forced to convince the patient that she is wrong, refuse further treatment, or compromise. Any of these options subvert the physician-patient relationship into a negotiation where a patient, relying on outside counsel, acts against the primacy of the physician to oversee the treatment of her illness."[151] This is a waste of physician energy and precious time. In addition, the patient may doctor shop for the physician who will acquiesce in the patient's wishes.[152] Finally, and most disturbingly, "the physician in a third-party-influence situation cannot with any certainty determine whether or how any advertising may have influenced the patient's description of her symptoms and aliments [sic]."[153] The argument is that "[c]ourts must see advertisements for what they are—manipulations that prey upon consumers in conscious and unconscious ways."[154]

Recent studies suggest that direct-to-consumer advertising is not the force it was expected to be (by its critics or its proponents). More data will become available in the future, but the current studies suggest three conclusions about this advertising that is relevant to debates about the learned intermediary doctrine.

First, data suggests that, even though direct-to-consumer advertising ("DTCA") affects overall pharmaceutical sales, it tends to do so at the level of a therapeutic class of medications, rather than at the level of an individual product.[155] A study on H_2 antag onists (drugs used to inhibit the production of stomach acid) concludes that "own-brand physician-oriented detailing and medical journal advertising efforts have positive and long-lived impacts on own Rx market share, while DTCA of the Rx brand has no significant impact on own Rx market share."[156] In contrast, there are significant increases in sales associated with over-the-counter DTCA.[157] This suggests that physicians may prescribe for a particular symptom or condition of the patient at his or her

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148. Richardson, *supra* note 2, at 1060.

149. *Id.* at 1050.

150. *Id.* at 1026.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 1060.

155. MEREDITH B. ROSENTHAL ET AL, DEMAND EFFECTS OF RECENT CHANGES IN PRESCRIPTION DRUG PROMOTION, KAISER FAMILY FOUNDATION 1, 5 (2003).

156. *Id.*

157. *Id.*

request, but will not prescribe the particular brand name product that is requested.

Second, when direct-to-consumer advertising does affect same-brand sales, it does so only when the brand is the preferred drug in its class in the formulary available to the physician.[158] Wosinska studied advertising and prescription sales of cholesterol-reducing medications.[159] She found that "DTCA, unlike detailing [sending salespeople out to doctor's offices to give them educational material and samples], affects individual drug market share only if that brand happens to have preferred status on the third party payer's formulary."[160]

Third, promotion to consumers is massively overshadowed by promotion directly to physicians, in terms of dollars spent and effectiveness. The promotion to sales ratio of physician promotion is 0.118, and the same ratio for direct-to-consumer advertising is 0.022.[161] Wosinska estimates that the "marginal impact of detailing is significantly larger than the marginal impact of consumer advertising (on the order of five times)."[162]

This data suggest that DTCA probably does not yet work to increase sales of particular brand name drugs, at least in a way that's predictable for pharmaceutical manufacturers. This data squares with what has, in fact, been the pharmaceutical manufacturers' actions in promotion. Although there has been a big increase in direct-to-consumer advertising since 1980 and exponential growth after the legal requirements were clarified in 1997,[163] physician-oriented approaches still comprise the vast majority of marketing budgets. Physician promotion "include[s] visits or phone calls by pharmaceutical sales representatives to physicians (detailing), free samples, print advertising, and sponsorship of medical education events."[164] Free samples account for 50.6% of spending on physician promotion.[165] In 2000, total physician promotion accounted for over $15.708 million, while DTCA promotion accounted for $2.467 billion.[166]

This Note concedes that direct-to-consumer advertising potentially has both positive and negative effects on patient care. It may educate consumers and bring them into the healthcare environment, but it can also lead to inappropriate use of

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158. *Id.* at 19.

159. *Id.* at 4-5.

160. *Id.* at 19.

161. *Id.* at 21.

162. Wosinska, *supra* note 137, at 3.

163. Department of Health and Human Services, Food and Drug Administration, *Draft Guidance for Industry; Consumer-Directed Broadcast Advertisements*, 62 Fed. Reg. 43,171-43,173 (Aug. 12, 1997).

164. ROSENTHAL ET AL., *supra* note 155 at 8.

165. *Id.*

166. *Id.* at 21. It is clear, however, that DTCA increased drug company profits. One study estimates that "$2.6 billion or 12% of the growth in total prescription drug spending between 1999 and 2000 was attributable to DTCA." *Id.* at 18. However, it still comprises only 15.7% of pharmaceutical marketing. *Id.* at 8.

drugs and overprescribing. However, the data regarding how direct-to-consumer advertising works so far is problematic as a justification for altering the learned intermediary doctrine for three reasons. First, it will be difficult to hold manufacturers liable for advertising that leads to inappropriate prescribing if the physician prescribes a different brand-name of the drug, which frequently happens. Second, the fact that physician promotion still dominates pharmaceutical manufacturing suggests that the pressures on physicians are not substantially different than they were before direct-to-consumer advertising. Finally, it is possible to manage these pressures without altering the doctrine. In fact, there are tools in quality managed care that can strengthen the ability of physicians to function as true learned intermediaries.

c. Managed care.—Managed care has also been identified as a major impediment to quality interactions between physicians and patients. Managed care principles have been used in some insurance companies since the early 1900s, but they became more popular during World War II, obviously predating *Sterling v. Cornish.*[167] It really began to take off, however, in the early 1990s, as costs of medical care began to rise dramatically. The goal of managed care was to increase access to healthcare and to free patients (and their physicians) from limitations on coverage that were common to indemnity plans.[168] A focus on costs of care was necessary to increase access and coverage. Managed care therefore "provides a mechanism for focusing the attention of decision makers on aggregate outcomes, and creates incentives for controlling aggregate costs, managing quality, and improving the overall health outcomes of the covered population."[169] Some of the tools it uses to manage quality and cost include: "screening and certifying the credentials of providers, assembling data that can help providers better understand and compare the track record of different treatment protocols for different diagnoses, and creating financial incentives to encourage providers to follow recommended protocols."[170]

All of these methods interfere, "to some degree, in what had been a relatively autonomous and uncontrolled relationship between providers and patients."[171] The relevant question vis-- vis the learned intermediary doctrine, of course, is what effect these practices have on physician judgment. Does managed care, generally, help physicians serve as a learned intermediary? Or, as critics claim, does it undercut their effectiveness so substantially that the doctrine should not apply unless the managed care arrangement is carefully scrutinized in each case? Another way of putting this is: should pharmaceutical manufacturers decline to

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167. Insurance companies using managed care and fee-for-service payment arose simultaneously, but fee-for-service was more popular until the 1980s. Health care costs rose so rapidly that payors (employers and the government) "began urgently searching for a better system." WOODSTOCK THEOLOGICAL CENTER, ETHICAL ISSUES IN MANAGED HEALTH CARE ORGANI ATIONS 13 (1999).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

trust the physician's judgment when he or she participates in a managed care insurance plan?

There are two characteristics of managed care that are particularly objectionable to commentators. First, commentators perceive time pressures on physicians under managed care that were absent in fee-for-service payment arrangements.[172] Although not spelled out by the commentators, the argument would be that managed care caused a reduction in physician income, so physicians felt compelled to see more patients per day. Therefore, physicians reduced the time spent with each patient, leaving less time to discuss side effects and other possible adverse reactions to prescription drugs.

One could argue (convincingly) that time pressures exist under any system of payment. Physicians get paid according to the number of patients they see and the number of billable procedures they do. It is malpractice under any system of payment for physicians to sacrifice competent care to increase their incomes. It does not follow that pharmaceutical manufacturers should now be responsible for investigating the individual contexts of medical care to see if physicians are committing malpractice.

The second troubling characteristic of managed care is the "control over the doctor patient relationship by third party payors."[173] Physicians clearly dislike having the involvement of third parties in their medical decision making. Physician autonomy was nearly absolute in fee-for-service payment arrangements; they were reimbursed for whatever they did, without being second guessed by bureaucrats.[174]

Physician autonomy does not improve patient safety. Physicians like practicing without external controls, and patients believe that physician freedom correlates with quality care. In fact, there is good reason to think that physician practice improves under managed care arrangements. Physician autonomy, combined with solo practitioners or those who practice in small groups, leads to astounding variances in physician practice.[175] One study found that 135 physicians would suggest eighty-two different treatments for the same patient.[176] Even Hall, a critic of managed care, notes the quality concerns under an unregulated system. "[L]ack of oversight led to well-documented overutilization and widely divergent and scientifically unsupported practice patterns."[177] Oversight "reduce[s] the instance of unnecessary, and even harmful, medical interventions."[178] There is no data to support the notion that undertreatment is more troubling than overtreatment because "few patient injuries occur from too

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172. Hall, *supra* note 2, at 227.

173. *Id.*

174. *Id.* at 226.

175. GEORGE C. HALVORSON & GEORGE J. ISHAM, EPIDEMIC OF CARE: A CALL FOR SAFER, BETTER, AND MORE ACCOUNTABLE HEALTH CARE 25 (2003).

176. *Id.* at 24.

177. Timothy S. Hall, *Bargaining with Hippocrates: Managed Care and the Doctor-Patient Relationship*, 54 S.C. L. REV. 689, 693-94 (2003).

178. *Id.* at 694.

much care."[179] Therefore, physicians likely function better as learned intermediaries with limited, rather than full, professional autonomy. Consumer safety is best served by well-trained physicians with information available about new studies of drug safety and with oversight of practice patterns, so that a patient can be confident that his or her physician is not among the unsafe outliers in medical practice.

IV. DEFENSE OF THE TRADITIONAL APPLICATION OF THE LEARNED INTERMEDIARY DOCTRINE

The learned intermediary doctrine in its current form is the most efficient way to serve the goals of tort law and the goals of healthcare in general. Physician expertise relating to the effects of prescription pharmaceutical products on individual patients justifies the doctrine. Physicians are the best parties for pharmaceutical manufacturers to warn because they can understand the warnings and communicate information about risks tailored to each individual patient. This warning system is efficient and serves the tort law goal of minimizing accident avoidance costs. Despite the ability of pharmaceutical manufacturers to reach consumers with package inserts and direct-to-consumer advertising, it remains just as difficult (if not impossible) for pharmaceutical manufacturers to tailor warnings to individual patients as it was when the term "learned intermediary" was coined in 1966.[180]

Although the learned intermediary doctrine remains the best and most efficient way to warn patients of potential side effects of prescription drugs, more can be done to strengthen the expertise of physicians and further protect patients. Managed care, far from being the source of problems, can be used to improve care and guard against illicit influences on physician prescribing behaviors, both in terms of direct-to-consumer advertising and physician promotions.

CONCLUSION

Two basic arguments have been advanced in favor of abrogating or altering the learned intermediary doctrine. The first is that physicians are no longer needed to act as intermediaries because patients are empowered and educated. It is therefore a vestige of paternalism to allow pharmaceutical manufacturers to warn physicians instead of the users of prescription drugs. This argument fails because educated consumers still need learned intermediaries that can tailor medical information to each individual's unique medical history.

The second argument is that the environment of healthcare delivery has changed so substantially that physicians can no longer be trusted to act in their

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179. This is Calabro's claim, but she cites no studies to confirm this position, and it does not make common sense. Calabro, *supra* note 2, at 2267. If 200,000 Americans die from adverse drug reactions each year (the statistic she cites) or even if the more conservative "ballpark" estimate of 100,000 deaths is true (Noah, *supra* note 91, at 449), overprescribing is a very serious problem and will likely lead to adverse patient health outcomes.

180. Sterling Drug, Inc. v. Cornish, 370 F.2d 82, 85 (8th Cir. 1966).

patients' best interests. This Note argues that calls for changing the learned intermediary doctrine are partly based on mistaken assumptions about the current healthcare environment. In particular, proponents of changing the learned intermediary doctrine tend to romanticize the doctor-patient relationship when the doctrine was adopted (circa 1966) and exaggerate pressures on physicians today. Physicians have always faced pressures of time constraints and financial conflicts of interest. Yet, the legal community (and society as a whole) has still expected them to exercise professional judgment. In addition, the effects of direct-to-consumer advertising have not been as pronounced as both critics and advocates had expected. It has had a modest impact on pharmaceutical sales, which tends to increase sales of therapeutic classes of drugs rather than at the level of specific brand-name prescriptions.[181]

Despite direct-to-consumer advertising, it remains true that the physician is in the best position to warn effectively the consumer about potential adverse effects of prescription drugs. It is untrue that managed care makes it impossible for physicians to act as learned intermediaries. Moreover, managed care in its best, modern form, can be a tremendous asset in providing quality healthcare, monitoring prescribing practices, and minimizing drug accidents in the first place. It should be seen as an ally, not an enemy, in physician judgment and patient health.

Opening up pharmaceutical manufacturers to additional liability for failure to warn does not change the fact that they cannot effectively warn individual patients and is unnecessary in light of the speculative data about both harms and benefits of direct-to-consumer advertising and managed care. If future studies demonstrate that direct-to-consumer advertising has become more effective and has subverted the physician's ability to exercise professional judgment, then this issue will need to be revisited. However, the important first step that healthcare delivery systems need to take is to strengthen the expertise of physicians so that they have all of the tools to function as experts on their patients' behalves.

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181. Wosinska, *supra* note 137, at 2.

UNIVERSITY LIABILITY WHEN STUDENTS COMMIT SUICIDE: EXPANDING THE SCOPE OF THE SPECIAL RELATIONSHIP

HEATHER E. MOORE*

INTRODUCTION

In recent years there has been a significant increase in the number of suicides occurring on college campuses. Statistics reveal that more than one thousand suicides occur on campus every year,[1] and media reports indicate that no institution is exempt.[2] As depression and suicide become more prevalent on college campuses, it is expected that suicide will replace binge drinking as the "number-one student risk factor in the minds of most college administrators."[3]

The legal significance of the issue is evidenced by the dramatic rise in lawsuits directed at universities.[4] As universities have become more vulnerable to liability in general, student suicide liability is one of the areas that universities have watched closely.[5] Recent decisions have further created uncertainty regarding the legal responsibility of universities and have compounded the concern regarding suicide liability.[6]

Although a special relationship between two parties may establish a duty to prevent the other from committing suicide, until recently, a finding of a special relationship has been limited to a narrow class of persons including mental health clinicians or those entrusted with the custodial care of another. In *Shin v. Massachusetts Institute of Technology*, the court expanded these limitations and identified a special relationship between non-clinician university administrators

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1. Health and Human Development Programs, *New Report Offers Blueprint for Suicide Prevention on Campuses*, HHD STORIES, Oct. 2004, http://hhd.org/hhdnews/hhdstories/fs_10_2004b.asp.

2. *See, e.g.*, Eric Lipton, *Second Suicide Leap Leaves New York University Shaken*, N.Y. TIMES, Oct. 12, 2003 (reporting a recent suicide at New York University); *see also* Ted Ross & Jesse Rogers, *After Suicide, Campus Reaches Out*, THE DAILY PENNSYLVANIAN, Oct. 14, 2005 (discussing a Wharton student's suicide).

3. *See* Peter Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-inflicted Injury*, 32 STETSON L. REV. 125, 125 (2002).

4. *See* Eileen M. Evans & William D. Evans, Jr., *"No Good Deed Goes Unpunished": Personal Liability of Trustees and Administrators of Private Colleges and Universities*, 33 TORT & INS. L.J. 1107, 1107 (1998).

5. *See* Eric Hoover, *Judge Rules Suicide Suit Against MIT Can Proceed*, 51 CHRON. OF HIGHER EDUC. 49, Aug. 12, 2005, at A1 (commenting that the recent *Shin* case is "stirring concerns among some college officials that the case heralds a storm of wrongful-death litigation"); *see also* Marcella Bombardieri, *Lawsuit Allowed in MIT Suicide*, BOSTON GLOBE, July 30, 2005, at B1.

6. *See* Hoover, *supra* note 5.

and a student who committed suicide on campus. The court held that the parents could proceed with their lawsuit against the administrators which alleged negligence in the failure to prevent their daughter's suicide.[7] *Shin* remains a decision of a trial court that was ultimately settled out of court in April 2006,[8] prior to a definitive holding on appeal. However, it nonetheless "does suggest that the legal landscape has changed" and that universities and non-clinician administrators are entering an era where potential liability is more expansive.[9] Prior to the lower court's decision, one MIT administrator was quoted: "If we don't [win], it has implications for every university in this country."[10]

This Note will analyze the impact of finding that universities and university administrators have a special relationship with students that establishes a duty to prevent them from committing suicide. Part I discusses the significance of this issue in light of the prevalence of suicide on campus and the increasing litigation involving universities. Part II traces the development of suicide liability, discussing the trend of expanding university liability away from the immunity they have historically benefited from. Part III explores the particular circumstances which may give rise to a special relationship between universities and students in light of relevant case law. Part IV offers suicide prevention strategies and protocols to avoid suicide liability. Finally, Part V examines three specific legal issues that universities will encounter as they develop plans for suicide prevention. This Note concludes that as this area of law remains uncertain, universities need to proactively shield themselves and their staff from liability by developing plans and strategies that effectively address suicide prevention on campus.

I. RELEVANCE OF SUICIDE LIABILITY TO COLLEGES AND UNIVERSITIES

A. Increasing Litigation Involving Universities

Recently universities have become "an inviting target for a wide variety of legal claims."[11] More specifically, the number of lawsuits involving student suicide has also increased. It has been noted that "[f]ive years ago college lawyers discussed among themselves perhaps one or two pending suicide cases at any given moment. Today the cases total about 10 nationwide, with the

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7. Shin v. Mass. Inst. of Tech., No. 02-0403, 2005 Mass. Super. LEXIS 333, at *36-37 (June 27, 2005).

8. *See* Marcella Bombardieri, *Parents Strike Settlement with MIT in Death of Daughter*, BOSTON GLOBE, Apr. 4, 2006, at B1. (The parents and the university "now agree that the young woman's death probably was an accident, not a suicide.")

9. DAMON SIMS, LEGAL ISSUES IN STUDENT AFFAIRS 2005 5 (Indiana Student Affairs Assoc., Indiana University—Bloomington, Oct. 19, 2005).

10. Deborah Sontag, *Who Was Responsible for Elizabeth Shin?*, N.Y. TIMES MAGA INE, Apr. 28, 2002, at 57.

11. Evans & Evans, *supra* note 4, at 1107.

prospect that many more suicides could, over time, move into the courts."[12]

Contributing to the increasing amount of university-related litigation is the public's perception of universities as wealthy organizations with infinite resources. Several private universities now have large endowments and assets in the billions.[13] Plaintiffs in search of "solvent defendants," will not hesitate to sue universities.[14] It has been speculated that the "deep pocket[s]" of universities combined with a "litigious society, and public cynicism about all charitable institutions" will result in rising claims against institutions of higher education and administrators in the years to come.[15]

Further adding to the increasing number of lawsuits involving universities is the demise of the doctrine of charitable immunity, opening the door to lawsuits involving non-profit institutions. For a significant portion of the twentieth century, colleges and universities enjoyed broad protection from lawsuits under the doctrine of charitable immunity.[16] The doctrine of charitable immunity stems from dicta found within two English cases.[17] While the English courts ultimately overruled the dicta and held the charitable organizations liable, Maryland[18] and Massachusetts[19] adopted the dicta and thus created a broad doctrine of charitable immunity.[20] As of 1938, forty states had adopted the doctrine of charitable immunity, which protected institutions including universities.[21] However, after harsh criticism of the doctrine in 1942 "state courts moved rapidly away from immunity."[22] By 1986, thirty three of the original forty subscribers to the doctrine of charitable immunity had abandoned it in whole or in part.[23] Although there are still several jurisdictions that recognize the doctrine in some form,[24] the doctrine has generally been abandoned. Consequently, parties are not prohibited from suing non-profit institutions.

B. Prevalence of Suicide on Campus

Alarming statistics reveal that suicide is now "likely the second leading cause

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12. Ann H. Franke, *When Students Kill Themselves, Colleges May Get the Blame*, 50 CHRON. HIGHER EDUC. 42, June 25, 2004, at B18.

13. Evans & Evans, *supra* note 4, at 1107.

14. *Id.* at 1121.

15. *Id.* at 1108.

16. *See id.* at 1108 (noting that the doctrine was in effect from the late 1800s until the mid 1900s).

17. *Id.* at 1109.

18. *See* Perry v. House of Refuge, 63 Md. 20, 20-26 (1885).

19. *See* McDonald v. Mass. Gen. Hosp., 120 Mass. 432 (1876).

20. Evans & Evans, *supra* note 4, at 1109.

21. *Id.*

22. *Id.* (citing Rutledge's opinion in Georgetown Coll. v. Hughes, 130 F.2d 810 (D.C. Cir. 1942)).

23. *Id.*

24. *Id.*

of death" among college students.[25] It is estimated that 1088 students commit suicide on college campuses each year.[26] Furthermore, suicide rates have been increasing "steadily among the young and nearly tripled between 1952 and 1995."[27] Despite these concerning statistics, the number of students successfully committing suicide is only a mere fraction of the number of students attempting and considering suicide.[28] The National College Health Risk Behavior Survey determined that 10.3% of surveyed college students "had seriously considered ending their own lives during the preceding 12 months."[29] Additionally, 6.7% of the surveyed students had developed suicide plans.[30]

C. Students with Mental Illness on Campus

Beyond suicide, university administrators are also struggling to address an "undergraduate population that requires both more coddling and more actual mental health care than ever before."[31] Medical advances specifically in the form of enhanced medication and psychotherapy have allowed many students suffering from mental illnesses, including severe depression, schizophrenia, and bipolar disorder to attend college.[32] Before the advent of such medications many of these students were prevented from pursuing higher education.[33] While most of these students are able to adapt to college life, it has been asserted that "there is still a segment of this population that may be particularly vulnerable to the stressors inherent in college."[34]

Recent reports from counseling centers also confirm increasing numbers of psychological illness on campus. Among the 274 counseling center directors surveyed in the National Survey of Counseling Center Directors in 2001, eighty five percent noted that they had experienced "an increase in severe psychological problems among students" in recent years.[35] These same counselors also reported

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25. SUICIDE PREVENTION RES. CTR., PROMOTING MENTAL HEALTH AND PREVENTING SUICIDE IN COLLEGE AND UNIVERSITY SETTINGS 5 (Oct. 21, 2004) (Prepared for the Center for Mental Health Services, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services).

26. *Id.*

27. Elizabeth Fried Ellen, *Suicide Prevention on Campus*, XIX PSYCHIATRIC TIMES 10, Oct. 2002, *available at* http://www.psychiatrictimes.com/p021001a.html (citing an undated published report of the CDC).

28. *Id.*

29. *Id.*

30. *Id.*

31. *See* Sontag, *supra* note 10. Sontag notes that administrators are "scrambling to redefine their relationship with parents and their role in the nonacademic lives of students who are adults by many yardsticks, and yet not quite." *Id.*

32. *See* Ellen, *supra* note 27.

33. *Id.*

34. *Id.*

35. *Id.* at 2.

that they had experienced increased incidents of self-injury among college students within the last five years.[36] As the number of students attending college with histories of mental illness continues to rise, it should be expected that incidents of depression and other mental illness will only make suicide more prevalent on campus.

II. SUICIDE LIABILITY

A. The Common Law Approach

Third party responsibility for another's suicide is a modern concept.[37] At common law, suicide was viewed as an act of the individual and therefore courts declined to impose liability upon third parties for failure to intervene.[38] Traditionally, American courts "categorically refused to find civil liability arising out of a failure to prevent suicide."[39] "Suicide was considered an illegal, deliberate, and intentional act" that was itself the sole proximate cause therefore precluding the liability of third parties.[40] In the twentieth century, public perception regarding suicide changed as medical advances revealed that suicide was often the culmination of severe mental illness, rather than a deliberate and criminal act.[41] As those committing suicide came to be viewed as victims of mental illness, the liability regarding suicide softened as well. Situations were identified where someone in close contact with the decedent could be found liable for failing to prevent the suicide.

B. Modern Approach

The general rule remains that third parties are not liable when another inflicts self-harm, but there are now two significant exceptions to the rule.[42] Today, a defendant can be held liable for the suicide of another if either of the following two conditions is met: 1) if it is found that the defendant caused the suicide; or 2) if it is found that the defendant had a duty to prevent the suicide from happening.[43] The first exception, actual causation, is very limited, found only in

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36. *Id.*

37. *See* Daniel W. Berglund, Case Note, *Recent Decisions of the Minnesota Supreme Court: Torts: Taking the "I" Out of Suicide: The Minnesota Supreme Court's Alarming Extension of Duty in "Exceptional Relationships"*—Sandborg v. Blue Earth County, 28 WM. MITCHELL L. REV. 1307, 1309 (2002).

38. *Id.*

39. Lake & Tribbensee, *supra* note 3, at 129.

40. *Id.* at 129-30.

41. *See* Kate E. Bloch, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 933 (1987) (stating that the "most cogent explanation of decriminalization lay in the belief that most suicides were caused by mental illness").

42. *See* Lake & Tribbensee, *supra* note 3, at 130.

43. *Id.*

rare circumstances generally involving physical abuse or torture that prompt the decedent to commit suicide without actual consideration of his or her actions.[44]

The second exception is more common. It "arises when the defendant has a legally recognized special relationship with a suicidal individual sufficient to create a duty to prevent suicide."[45] Mere knowledge that the decedent was in danger has traditionally not been enough to impose a special relationship, and subsequently a duty, to prevent the suicide.[46] The special relationship has typically been reserved for custodial situations such as hospitals, jails, and reform schools, where one party has full responsibility for the care of another.[47] Additionally, courts have identified special relationships between mental health professionals and their patients because of their extensive training in mental health care.[48]

C. Universities and the Special Relationship

Universities and university employees and administrators have generally avoided suicide liability because they have not been found to fall within either of the exceptions to the general rule of no duty to prevent suicide.[49] Most significantly, courts have narrowly applied the concept of the special relationship to universities.[50] Although a special relationship between a school and student has been identified on the secondary school level where schools stand *in locus parentis*,[51] the independent nature of college students on campus makes them distinguishable.[52] Institutions of higher education often pride themselves on treating their students as adults, emphasizing the freedoms that the university and administrators allow students to enjoy. Because college students are thought to be self-sufficient, courts have not identified special relationships between them and their respective institutions that would impose a duty to prevent suicide. Professors Lake and Tribbensee discuss the protection that universities have received:

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44. *Id.*

45. *Id.* at 132.

46. *See id.*

47. *See id.* at 132-33.

48. *Id.* at 133.

49. *See id.* at 135.

50. *See* Hoover, *supra* note 5 (noting that "colleges and their employees generally have not been held liable for student suicides").

51. In *Eisel v. Board of Education of Montgomery County*, the court held that "[middle] school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student's suicidal intent." Eisel v. Bd. of Educ. of Montgomery County, 597 A.2d 447, 456 (Md. 1991).

52. In *Schieszler v. Ferrum College*, the court discussing the doctrine of *in locus parentis* as it related to Ferrum College said, "[t]he instant case does not involve a minor, and therefore, strictly speaking, no duty arises from an *in loco parentis* relationship." Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 608 (W.D. Va. 2002).

> The limited exceptions to the no-duty-to-prevent-suicide rule have protected universities from liability for a student suicide in a broad range of cases. Thus, for example, the mere fact that a student is depressed, isolated or lonely, receives bad grades, is socially ostracized, or engages in high-risk alcohol use does not itself impose a responsibility upon the university to intervene to prevent suicide. Students are expected to shoulder the stresses and burdens of the transition into the college environment, even if those burdens are very high.[53]

Jain v. Iowa[54] illustrates the traditional approach that courts have taken towards universities regarding the special relationship. In *Jain*, the plaintiff's son, Sanjay, committed suicide in his dorm room during his freshman year at the University of Iowa. The plaintiff brought a wrongful death action against the university claiming that his son's death "proximately resulted from university employees' negligent failure to exercise care and caution for his safety."[55] The plaintiff specifically claimed that the suicide might have been prevented had the university followed its established policy of parental notification when students exhibit self-destructive behavior.[56]

Throughout his first semester Sanjay struggled academically and personally.[57] He faced disciplinary measures from the university for participating in a prank and for smoking marijuana in his dorm room. Prior to Thanksgiving, resident assistants were called to his dorm room where his girlfriend alleged that Sanjay was planning to commit suicide by inhaling exhaust fumes from the motorized cycle he had taken to his room. Sanjay admitted to making such preparations and agreed to see a counselor.[58] Sanjay saw the counselor, Merritt, the next day and he agreed to call her if he felt suicidal again. However, he declined to give her permission to call his parents, and his parents were not notified of the incident.[59] Merritt reported to her supervisor that he appeared to be suffering from "tiredness on his part [rather] than hopelessness or despair."[60] Subsequently, Sanjay went home for Thanksgiving but exhibited no abnormal behavior and made no mention of his struggles at school. He returned to school, but on December 4, was found dead in his apartment from "self-inflicted carbon monoxide poisoning."[61]

The district court held that there was not a special relationship between the university and the student that created a duty to prevent Sanjay from committing suicide.[62] On appeal the plaintiff claimed that the university's awareness of

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53. Lake & Tribbensee, *supra* note 3, at 135.
54. 617 N.W.2d 293 (Iowa 2000).
55. *Id.* at 296.
56. *Id.* at 294.
57. *Id.* at 295.
58. *Id.*
59. *Id.* at 296.
60. *Id.*
61. *Id.*
62. *Id.* at 296-97.

Sanjay's condition and need for medical treatment "created a special relationship giving rise to an affirmative duty of care toward him."[63] Specifically, the plaintiff relied on Restatement (Second) of Torts section 323:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.[64]

The Supreme Court of Iowa found that under section 323, "the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun performance."[65] Ultimately, the court held, "no action by university personnel prevented Sanjay from taking advantage of the help and encouragement being offered, nor did they do anything to prevent him from seeking help on his own accord."[66] The court affirmed the district court and concluded that there was not a special relationship between Sanjay and the university that obligated the university to prevent the suicide.[67]

D. Expansion of the Special Relationship

Although the *Jain* decision is often still cited[68] and is arguably "the most viable precedent"[69] regarding university liability when students commit suicide, more recent case law indicates that the notion of "limited exceptions" may now be "eroding" and that a special relationship could be identified in a broader set of circumstances.[70] Since the *Jain* decision in 2000, the following two cases have attempted to place greater responsibility on the university and administrators to prevent student suicide and adopted a more inclusive framework for determining when a special relationship exists.

In *Schieszler v. Ferrum College*[71] the tide first turned regarding suicide liability and universities. In *Schieszler*, a 2002 decision of the United States District Court for the Western District of Virginia, the court found that university officials had a special relationship with a student that created a duty to prevent the

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63. *Id.* at 297.

64. RESTATEMENT (SECOND) OF TORTS § 323 (2005).

65. *Jain*, 617 N.W.2d at 299.

66. *Id.* at 299.

67. *Id.* at 299-30.

68. *See* Hoover, *supra* note 5 (mentioning *Jain* while noting that not all "wrongful-death lawsuits decided recently have . . . increased colleges' legal responsibilities").

69. Rob Capriccioso, *Settlement in MIT Suicide Suit*, INSIDE HIGHER ED, Apr. 4, 2006, http://insidehighered.com/layout/set/print/news/2006/04/04/shin.

70. Lake & Tribbensee, *supra* note 3, at 135.

71. 236 F. Supp. 2d 602 (W.D. Va. 2002).

student from committing suicide.[72] Frentzel was a freshman at Ferrum College when he began exhibiting suicidal tendencies.[73] He wrote suicidal notes to his girlfriend who consequently informed university officials including his Resident Assistant, Holley, and the Dean of Student Affairs, Newcombe, of his behavior. Holley and Newcombe persuaded Frentzel to sign a document promising that he would not hurt himself and told his girlfriend that she could not go to his room, but they took no further action.[74] Three days later Frentzel was found dead in his room having hung himself. Frentzel's guardian filed a wrongful death suit against Ferrum College, Newcombe, and Holley, alleging that the defendants "'knew or personally should have known that Frentzel was likely to attempt to hurt himself if not properly supervised,' [and] that they were 'negligent by failing to take adequate precautions to insure that Frentzel did not hurt himself.'"[75]

The district court acknowledged that under typical circumstances an individual does not have an affirmative duty to act or intervene on another's behalf unless such a duty arises from a special relationship between the parties.[76] The court relied on section 314A of the Restatement (Second) of Torts which lists several recognized special relationships, "including the relationship between a common carrier and its passengers, an innkeeper and his guests, a possessor of land and his invitees, and one who takes custody of another thereby depriving him of other assistance."[77] The court emphasized that the list was not exhaustive and that additional special relationships may exist.[78] The court analyzed Virginia law regarding special relationships in other contexts and determined that there must be "foreseeability of the harm" to establish a special relationship.[79] Under the facts of the case, the court found that Frentzel's self-inflicted harm was foreseeable based on his communications and actions which Newcombe, Holley, and the college were aware of.[80]

The court determined that it was unlikely that Virginia would find that a "special relationship exists as a matter of law between colleges and universities and their students, it might find that a special relationship exists on the *particular facts* alleged in this case."[81] The court allowed the suit to proceed against Newcombe and Ferrum because they "could have breached their duty to render assistance to Frentzel," but said that Holley could not have taken any additional steps to prevent Frentzel's suicide.[82]

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72. *Id.* at 611.
73. *Id.* at 605.
74. *Id.*
75. *Id.*
76. *See id.* at 606.
77. *Id.*
78. *Id.* at 607.
79. *Id.* at 609.
80. *Id.*
81. *Id.* (emphasis added).
82. *Id.* at 610.

Although the case was eventually settled out of court,[83] the *Schieszler* decision was the first signal to universities that the liability related to suicide may be changing. It was noted that this was an area of law potentially in flux and that if the *Schieszler* decision was followed in subsequent cases that suicide liability could be changing drastically.[84] In fact, three years later in *Shin v. Massachusetts Institute of Technology*, the most recent case to address the issue, the trial court drew strong comparisons to the facts of *Schieszler* and ultimately relied on its holding to reach a similar conclusion.[85]

Elizabeth Shin began exhibiting suicidal tendencies during her freshman year at Massachusetts Institute of Technology ("MIT").[86] In her second semester, Elizabeth was admitted to the hospital for an overdose on Tylenol with codeine. At that point, she consented to parental notification, and following her discharge, was taken by her father to meet with MIT's Mental Health Services Department.[87] Elizabeth's Residence Hall Director, Davis-Mills, and the Dean of Counseling and Support Services ("CSS"), Henderson, were made aware of her fragile condition and she saw numerous psychiatrists who were a part of the MIT mental health team throughout the rest of the year.[88] She returned home for her summer break.

In her sophomore year, her mental health condition declined as numerous suicide threats were reported by faculty and students to Davis-Mills and Elizabeth's team of psychiatrists.[89] Just prior to spring break, she was ordered to remain in MIT's infirmary overnight for observation, and with permission her parents were contacted. Her father picked her up and brought her home to New Jersey.[90] When she returned from spring break, she began seeing a new psychiatrist, who did not review Elizabeth's record or history prior to meeting with her. Shortly thereafter, Davis-Mills was told on numerous occasions by students and faculty that Elizabeth's mental health was "deteriorating."[91] Elizabeth continued to regularly meet with a variety of mental health care professionals at the school, and it was suggested by one that it might be best for Elizabeth to be admitted to the hospital, but no specific plans were made.[92]

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83. *See* Bombardieri, *supra* note 5 (noting "that case was ultimately settled out of court").

84. *See* Lake & Tribbensee, *supra* note 3, at 136. In response to the *Schieszler* decision, Lake and Tribbensee asserted that: "This case will be closely watched and could, if it stands, rewrite college-suicide law." *Id.*

85. Shin v. Mass. Inst. of Tech., No. 02-0403, 2005 Mass. Super. LEXIS 333, at *35 (June 27, 2005). "More recently, in *Schieszler v. Ferrum College*, a similar case to the instant case . . ." *Id.*; Hoover, *supra* note 5 (noting that "[t]he judge based her conclusion [in *Shin*] on *Shieszler v. Ferrum College*").

86. *Shin*, 2005 Mass. Super. LEXIS 333, at *2.

87. *Id.* at *2.

88. *Id.* at *3-5.

89. *Id.* at *6-8.

90. *Id.* at *7.

91. *Id.* at *8.

92. *Id.* at *10.

Subsequently, two days before her death, Elizabeth made suicidal comments to students who in turn reported them to campus police. The on-call psychiatrist spoke with her briefly over the phone, but allowed her to remain in the dorm and did not pursue any additional means for monitoring her condition.[93]

Elizabeth's parents briefly visited their daughter on April 9 at school.[94] They commented that, "[h]er eyes did look tired and puffy" but they thought that was typical of a student under stress at MIT.[95] Elizabeth made no mention to them of her deteriorating condition, and they claim they did not know that a psychiatrist had considered hospitalization.[96] On April 10, a joint meeting of the deans and psychiatrists was held at which time the severity of Elizabeth's condition was discussed.[97] Although a specific plan was not identified, following the meeting a psychiatrist called Elizabeth and left a message that she had an appointment at an outside facility the next day. However, that evening Elizabeth was found in her room "engulfed in flames" and was subsequently pronounced dead from "self-inflicted thermal burns."[98]

Elizabeth's parents filed suit against MIT, MIT Medical Professionals, MIT Administrators and MIT Campus Police.[99] In total, the Shins complaint alleged twenty-five counts on various grounds. In June 2005, the court addressed numerous motions to dismiss. This Note will focus on two of the plaintiff's claims specific to the university administrators and their corresponding motions to dismiss.

MIT administrators Henderson and Davis-Mills moved for summary judgment regarding the counts brought against them, arguing that they did not have a duty to prevent Elizabeth from committing suicide.[100] To support their argument they relied on the following Massachusetts law: "[P]ersons who are not treating clinicians have a duty to prevent suicide only if (1) they caused the decedent's uncontrollable suicidal condition, or (2) they had the decedent in their physical custody, such as a mental hospital or prison, and had knowledge of the decedent's risk of suicide."[101] Henderson and Davis-Mills asserted that as non-treating clinicians neither of the above conditions had been met and therefore they did not have a duty.[102] However, as in *Schieszler*, the court relied upon Section 314(a) of the Restatement (Second) of Torts, which dictates that a special relationship between the parties may also give rise to a duty where one does not

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93. *Id.* at *11-12.

94. Sontag, *supra* note 10.

95. *Id.*

96. *Id.*

97. *Shin*, 2005 Mass. Super. LEXIS 333, at *13.

98. *Id.* at *15 (quoting medical examiner's report). Despite the medical examiner's report, following the settlement between the parties, both the parents and the university now believe that Elizabeth's death was accidental and not suicide. Bombardieri, *supra* note 8.

99. *Shin*, 2005 Mass. Super. LEXIS 333, at *1.

100. *Id.* at *31.

101. *Id.* at *32 (citing Nelson v. Mass. Port Auth., 771 N.E.2d 209 (Mass. App. Ct. 2002)).

102. *Id.*

already exist.[103] The court looked to a variety of university cases and determined that in other types of cases courts had found a special relationship between administrators and students. Specifically, the court cited *Mullins v. Pine Manor College*, where the court found that a college and an administrator had a special relationship with students and therefore a duty to protect students against criminal acts.[104] The court also relied upon *Schieszler v. Ferrum College* for the premise that the university did have a special relationship with a student and therefore a duty to protect the student.[105]

Ultimately, in *Shin*, the court determined that Henderson and Davis-Mills had notice of Elizabeth's condition and could have reasonably foreseen that Elizabeth would harm herself.[106] Consequently, the court determined that "there was a 'special relationship' between the MIT Administrators, Henderson and Davis-Mills, and Elizabeth imposing a duty on Henderson and Davis-Mills to exercise reasonable care to protect Elizabeth from harm."[107] Subsequently, the administrator's motion to dismiss for gross negligence was denied. The plaintiffs had asserted gross negligence on behalf of the treatment team because they failed to enact a treatment strategy to combat Elizabeth's numerous suicide threats. The court found that Henderson and Davis-Mills were a part of Elizabeth's treatment team and the plaintiffs had "sufficient evidence of a genuine issue of material fact as to whether the MIT Administrators were grossly negligent in their treatment of Elizabeth."[108] Additionally, the court allowed the plaintiffs' claims to proceed regarding negligence and wrongful death because the plaintiffs had "sufficient evidence to raise a genuine issue of material fact as to whether MIT administrators breached their duty and proximately caused Elizabeth's death."[109]

In the wake of the *Shin* decision, the media noted that, "legal uncertainty [following *Shin*] is causing a furor among college officials."[110] Gary Pavela, the Director of Student Judicial Programs at the University of Maryland at College Park, commented that the *Shin* and *Schieszler* decisions together have "national implications" for universities.[111] Pavela even cautioned that in response to these decisions it may be best for universities to "err on the side of overreaction" in

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103. RESTATEMENT (SECOND) OF TORTS §314A (2005).

104. Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983).

105. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 606 (W.D. Va. 2002).

106. *Shin*, 2005 Mass. Super. LEXIS 333, at *36-37.

107. *Id.* at *38.

108. *Id.* While not addressed in this Note, the court also denied the motion of the medical professionals on a similar claim of gross negligence. The plaintiffs asserted that the medical professionals had failed to develop a coordinated treatment plan to ensure Elizabeth's well-being, and the court found that the plaintiffs had sufficient evidence to proceed in that claim. *Id.* at *25.

109. *Id.* at *39.

110. Bombardieri, *supra* note 5.

111. Barbara Lauren, *MIT Student Suicide Case Cleared to Go to Trial; FERPA Health and Safety Exception May Be Involved* (AACRAO Transcript), Aug. 3, 2005, www.aacrao.org/transcript/index.cfm?fuseaction=show_print&doc_id=2791. Pavela has also commented that the *Shin* decision is "very new ground" for universities. Bombardieri, *supra* note 5.

dealing with potentially suicidal students.[112] Sheldon Steinbach, vice president and general counsel at the American Council on Education, also expressed fears that *Shin* "increases the scope of liability, the expansion of the blame game, and the potential for suits solely designed for settlement."[113] However, universities hoping for clarification and a final determination on appeal were left to question when the case was settled out of court. The questions surrounding the expansion of the special relationship are still unsettled and yet to be determined in "almost certainly, another lawsuit."[114]

III. WHAT PARTICULAR FACTS WILL GIVE RISE TO A SPECIAL RELATIONSHIP?

Despite their limited precedential value, *Schieszler* and *Shin* offer valuable insight that can be used to assist universities in avoiding future liability or large settlements in the future. In reaching their individual conclusions, both courts emphasized that the suicide was foreseeable and therefore that the administrators did have a special relationship with the student and consequently a duty to prevent the suicide. In *Schieszler*, the court was careful to say that Virginia law would probably not find that a special relationship exists *in general* between a student and a university, but rather the "*particular facts*" of the case warranted a finding of a special relationship.[115] Although neither decision identified the facts that gave rise to a special relationship, use of the phrase "particular facts" implies that the special relationship will only be found in unusual cases where the foreseeability of the impending suicide should have been apparent to university administrators.[116] Below is an analysis of the factual similarities between *Schieszler* and *Shin* that may serve as predictors of fact patterns that would create liability in future cases.

A. Reports of Suicide Threats Were Made to Administrators

In both *Schieszler* and *Shin*, administrators received several reports from third parties of the decedent's intention to commit suicide. In *Schieszler*, administrator Newcombe was made aware of at least three separate notes addressed to Frentzel's former girlfriend indicating that Frentzel was contemplating suicide.[117] Upon discovery of one such note, the police had entered his dorm room to find him with self-inflicted bruises on his head.[118]

In *Shin*, on numerous occasions reports had been made to Davis-Mills and

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112. Lauren, *supra* note 111.

113. Hoover, *supra* note 5.

114. Capriccioso, *supra* note 69.

115. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (emphasis added).

116. *Id.* After the *Shin* decision, David DeLuca, counsel for the Shins, commented that the decision will not affect university administrators to the degree that has been feared. He said, "[t]here's no sense from this decision that a university administrator has an absolute duty to ensure the safety of all students under all circumstances." Hoover, *supra* note 5.

117. *Schieszler*, 236 F. Supp. 2d at 605.

118. *Id.*

Henderson regarding Elizabeth's condition. In Elizabeth's freshman year, Davis-Mills was contacted when Elizabeth was hospitalized for a Tylenol overdose.[119] In Elizabeth's sophomore year, Henderson received an e-mail in which one of Elizabeth's professors reported that Elizabeth had told a teaching assistant of plans to take sleeping pills.[120] Davis-Mills was subsequently made aware of the e-mail. Later that year, a student informed Davis-Mills that Elizabeth was "cutting herself and extremely upset."[121] Just two days later, another student reported to Davis-Mills that Elizabeth did not seem well, and in the coming weeks numerous students and tutors made similar comments to Davis-Mills.[122] Davis-Mills expressed her concern regarding Elizabeth to Henderson. The day that Elizabeth died, students had warned Davis-Mills that Elizabeth had plans to commit suicide. Again, Davis-Mills had reported the incident to Henderson.[123]

B. Administrators Had Conversations with the Student Regarding Suicidal Thoughts

In addition to reports from third parties, in both cases administrators were in direct contact with the student. In *Schieszler*, in response to the first suicidal note Newcombe spoke directly to Frentzel and asked him to sign a document which promised that he would not harm himself.[124] In *Shin*, Davis-Mills and Henderson both had numerous conversations with Elizabeth regarding her condition. On several occasions, following reports from students, Davis-Mills had made contact with Elizabeth. Henderson had also regularly been in contact with Elizabeth. Elizabeth had informed Henderson of her cutting habit, and just weeks before she died, Elizabeth had contacted Henderson to request help in obtaining extensions on class assignments because of her mental condition.[125]

C. Administrators Required the Student to Receive Counseling

Finally, in both situations concern regarding the student's behavior had warranted administrators to refer the student on to a counselor, psychiatrist or mental health specialist. In *Schieszler*, following "disciplinary issues," Frentzel was required to enroll in anger management counseling prior to returning for his second semester.[126] In *Shin*, administrators repeatedly requested and required Elizabeth to visit mental health professionals. Following her overdose freshman year, Elizabeth was seen by a psychiatrist from MIT's Mental Health Services Department. In her sophomore year, Henderson had scheduled an immediate

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119. Shin v. Mass. Inst. of Tech., No. 02-040, 2005 Mass. Super. LEXIS 333, at *2 (June 27, 2005).

120. *Id.* at *6.

121. *Id.*

122. *Id.* at *8.

123. *Id.* at *12.

124. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 605 (W.D. Va. 2002).

125. *Shin*, 2005 Mass. Super. LEXIS 333, at *7.

126. *Schieszler*, 236 F. Supp. 2d at 605.

session for Elizabeth upon discovery of her cutting habit.[127] Davis-Mills also convinced Elizabeth to go to MIT Mental Health upon receiving student reports that Elizabeth was harming herself.[128] Additionally, on numerous occasions, Elizabeth visited MIT Mental Health at the prompting of others, at her own discretion, and for regularly scheduled appointments with her treating psychiatrists.

D. Conclusions

In both cases, it is apparent from third party reports, direct interactions with the student, and the referral to the counseling center or mental health professional that the administrators were at least aware of the student's fragile condition. The repeated notifications from third parties regarding suicidal tendencies indicate that it should have been foreseeable in the minds of administrators that the student was considering suicide. Additionally, in both cases administrators were aware that the student had been seen or was currently under the care of mental health professionals. Although an administrator may assume that by referring the student to a mental health professional that they have absolved themselves of liability, these decisions indicate that is not the case. Even if the student is under the care of a professional, if the student's suicide is foreseeable, the administrator may still have a duty to prevent that student from committing suicide.

The good news for universities is that a court is unlikely to find a suicide is foreseeable if the student does not give any warning or make public threats. Because both courts (*Sheiszler* and *Shin*) stressed the foreseeability of the harm as a significant factor in identifying a special relationship, it would be unlikely that without any warning signals a court would find that a special relationship exists between the parties. To this end, the attorney representing the Shins, David DeLuca commented that it is the specific facts of the *Shin* case, and more particularly the acts of the administrators, that he believes gave rise to their liability.[129] DeLuca said, "a case in which a student kills himself without alerting anyone about his immediate intentions would differ from a case in which a student had told others of his plans."[130] University administrators should not readily fear liability in situations where they are unable to foresee the student's actions.

IV. How Should Universities Proceed?

With the knowledge that foreseeable harm may lead a court to identify a special relationship and subsequent liability, how should universities respond in an effort to shield themselves and their staff? "Since the Shin case was first filed, MIT has made a number of enhancements to the mental health services it

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127. *Shin*, 2005 Mass. Super. LEXIS 333, at *6.

128. *Id.*

129. Hoover, *supra* note 5.

130. *Id.*

provides to students."[131] All institutions of higher education should take note of the lessons learned in *Shin* and capitalize on the experience of MIT by enhancing their own mental health departments. Perhaps most importantly, universities need an established suicide prevention plan that serves as a resource to everyone on campus regarding the proper protocol to follow when suicide threats are reported.[132]

A. Consistent Communication

Treating clinicians are clearly in the best position to assess and make decisions regarding the well-being of students exhibiting signs of depression and suicidal tendencies. In *Shin*, the court emphasized the lack of coordinated effort among university personnel to address Elizabeth's short-term needs and to develop an effective treatment program for her.[133] The lack of communication among the handful of clinicians who saw her and the university administrators was apparent even on the morning of her death at the weekly meeting of the deans and psychiatrists when a definitive plan was not made to address Elizabeth's deteriorating condition.[134] Unaware of the number of threats she had made previously or the severity of her condition, any clinician treating Elizabeth would have been unable to reach an educated decision regarding both short-term and long-term care options.

To avoid this inconsistency and subsequent lack of effective treatment, on-campus counseling centers should strive for constant communication among clinicians. Although the size and nature of the counseling center will vary by institution, communication regarding particularly volatile students among clinicians within the center should happen at least once a week. As an additional means of maintaining a coordinated effort, one clinician should be assigned to each student who visits the center, and this person should have the primary responsibility for monitoring the student's condition. Because it is unlikely that a student will be able to be seen by the same clinician on every visit, especially in emergency situations, there should be a primary treating clinician who receives

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131. Capriccioso, *supra* note 69.

132. In 2004, the Suicide Prevention Resource Center prepared a report with funding from the U.S. Department of Health and Human Services, "Promoting Mental Health and Preventing Suicide in College and University Settings." This excellent resource, commonly referred to as the "White Paper," offers statistics regarding suicide on campus, factors that may help identify volatile students, and strategies for suicide prevention on campus. The document stresses the importance of a "comprehensive approach to suicide prevention." SUICIDE PREVENTION RES. CTR., *supra* note 25, at 17. Specifically it asserts that a "comprehensive approach will be more effective when it includes consistent and coordinated activities in all the social spheres in which the target audience (in this case, college students) live, study, work and play." *Id.*

133. The court said, "As a 'treatment team,' the professionals failed to secure Elizabeth's short-term safety in response to Elizabeth's suicide plan in the morning hours of April 10." Shin v. Mass. Inst. of Tech., No. 02-0403, 2005 Mass. Super. LEXIS 333, at *24 (June 27, 2005).

134. *Id.* at *13.

all updates and information related to that student. Furthermore, one record should be maintained for each student and stored in a central file cabinet for the center.[135] This will allow any clinician who treats a student in an emergency or unexpected situation to contact the primary treating clinician with questions or to take note of the previous treatment program and make an informed decision regarding future treatment options.

There should also be regularly scheduled meetings between the deans and the psychiatrists or other representatives of the counseling center.[136] At these meetings, students of particular concern can be discussed as well as the available treatment options. Administrators who may have more contact with faculty and students will be able to report to the counseling center anything they have heard regarding the student. Together the administration and the clinicians can discuss treatment options, including decisions regarding the need for reduced class loads, a change in residential housing, or more involved supervision. For students such as Elizabeth who have made numerous visits to the counseling center as well as several suicide threats to peers and professors, it is imperative that the counseling center and administrators together reach a definitive strategy to assist the student.

B. Training

Universities need to invest in the development of suicide prevention training programs for residence life staff, administrators, faculty and others who are in close contact with students.[137] Training programs strive to alleviate ineffective responses to foreseeable harm. Such programs should focus on symptoms of suicidal students, when action is necessary, and the proper course of action when a suicidal student is identified or a threat is made.[138] As evidenced in the *Shin* case, residential life staff can be susceptible to liability because of their constant interaction with students in the dormitories.[139] Prior to the beginning of the school year, all residence life staff should undergo at least one segment of training dedicated to suicide awareness and prevention. Because they are in the

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135. *See* ANN FRANKE ET AL., DEALING WITH DISTRESSED AND SUICIDAL STUDENTS: LEGAL POLICY ISSUES, NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS, Virtual Seminar, 32 (Oct. 14, 2005) (noting that universities should "[e]ncourage counselors to maintain client files with bad outcomes in mind").

136. *Id.* at 15 (noting that the *Shin* decision (where there were meetings of the deans and psychiatrists) does not "justify abandonment" of these types of meetings).

137. *See* Bloch, *supra* note 41, at 944-45 (discussing the importance of training people to recognize "screams" for help); *see also* Lake & Tribbensee, *supra* note 3, at 154-55.

138. Several organizations offer live training programs, as well as electronic training programs. Suicide TALK is one of the examples of electronic training programs available. *See* Living Works Education, Inc., Suicide Talk: An Exploration in Suicide Awareness, http://www.livingworks.net/ST.php (last visited Jan. 8, 2007).

139. Davis-Mills was the housemaster of Elizabeth's dormitory. *Shin*, 2005 Mass. Super. LEXIS 333, at *3. She often received reports from students regarding suicidal comments that Elizabeth had made. *Id.*

best position to observe the daily habits of students, they should be aware of signs of suicidal students as well as the appropriate response when students express concern regarding another student.

Faculty should also be trained in suicide prevention.[140] In both *Jain* and *Shin*, the suicide appeared to be prompted in part because of the pressures inherent in college life, including academic hardship.[141] In *Shin*, Elizabeth felt she was struggling in her coursework and had requested extensions on her assignments. She also told at least one teaching assistant that she had intended to kill herself.[142] Because faculty are often aware of a student who is falling behind or performing poorly, they have an opportunity to interact with such students who may be suffering from depression and consequently contemplating suicide. An effective option for training faculty is the electronic suicide prevention programs.[143] These programs are often completed at the convenience of the professor within a designated period of time and offer the suicidal signs professors should be looking for and the appropriate means to address them. In addition, accompanying any university-sponsored training program should be a concise document tailored to the individual institution that details the appropriate response to a suicide threat.

C. A Variety of On-Campus Resources

The coordinated plan should involve several resources for students to turn to when they or their friends experience symptoms of depression or suicidal tendencies. The majority of colleges and universities do house an on-campus counseling or mental health facility, and often the services are free to students as the costs are incorporated into tuition and other fees.[144] Despite the presence of such centers, students may be unaware of the scope of the work of the counseling center or fear a stigma attached with making a visit. Students may think their issue or concern does not warrant an appointment. Therefore, universities and counseling centers should seek to enhance the visibility of counseling centers on campus and encourage students to take advantage of the programs and services

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140. *See* Lake & Tribbensee, *supra* note 3, at 154-55 (emphasizing the importance of training the "academic staff" at a university).

141. In *Jain*, Sanjay was reported to be suffering both personally and academically. Jain v. Iowa, 617 N.W.2d 293, 295 (Iowa 2000). In *Shin*, Elizabeth had requested numerous extensions on work and examinations, and she told one clinician that she was "considering transferring from MIT due to her marginal performance in some of her classes." *Shin*, 2005 Mass. Super. LEXIS 333, at *4.

142. *Shin*, 2005 Mass. Super. LEXIS 333, at *6.

143. *See, e.g.*, *supra* note 138.

144. *See* SUICIDE PREVENTION RES. CTR., *supra* note 25, at 21 (discussing the fact that many such counseling centers are not currently staffed or open twenty four hours per day and recommending that counseling centers develop procedures for incidents that occur on the weekends or other off hours).

offered.[145]

Acknowledgment of the counseling center should begin at freshman orientation.[146] As evidenced in all three of the above cases, often depression and suicidal tendencies strike early in a student's college career, as they adjust to living on their own and the pressures of college life.[147] As one of the required seminars at freshman orientation, students should hear briefly about the work of the counseling center and be encouraged to visit for any variety of issues.

In addition to counseling centers, universities should have web-sites (often these are coordinated through the counseling center) that provide information regarding signs of depression and suicide and what to do when they themselves or someone they are close to are experiencing such symptoms or emotions. As the internet is now a prevalent source of information for college students, this provides an anonymous means for students to research depression and suicide.[148]

Residential campuses generally offer a variety of educational programs throughout the year targeting hot-button issues on campus, either through individual dormitories or other small groups. Such events should be planned to specifically address depression and suicide awareness. A speaker from the counseling center might speak to the issue followed by an open forum for discussion of individual student experiences or questions relating to how to approach or encourage friends they know suffering from similar symptoms.

D. Consistent Response to All Suicide Threats

University and college administrations need to develop a consistent plan[149] that is well-documented and perhaps even posted on the university's (or counseling center's) web-site, to detail the standard procedure to follow when suicide threats occur or when suicidal students are identified.[150] Often, as

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145. *See* FRANKE ET AL., *supra* note 135, at 32.

146. Craig Miller, M.D., assistant professor of psychiatry at Harvard Medical School and Editor-in-Chief of the Harvard Mental Health Letter, has commented: "I think there is that pressure, especially in the freshman year, when there's initial anxiety that's going to settle out.... They need help with the transition and once they make it, it's quite successful." Ellen, *supra* note 27. Lisa Cohen Barrios, Dr. P.H., has also commented "a freshman survey on a health center intake form 'would be a perfect place to ask these questions.'" *Id.*

147. In all three of the above cases, the students first exhibited suicidal tendencies in their freshman year. In both *Jain* and *Schieszler*, the student actually committed suicide in his freshman year. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 605 (W.D. Va. 2002); Jain v. Iowa, 617 N.W.2d 293, 295 (Iowa 2000).

148. *See* FRANKE ET AL., *supra* note 135, at 32 (suggesting the use of counseling center web-sites). Numerous universities already have comprehensive web-sites that discuss depression and suicide. The University of Michigan offers a good example of comprehensive web-site. *See, e.g.*, http://www.umich.edu/~caps/.

149. *See* Lake & Tribbensee, *supra* note 3, at 153 (emphasizing the importance of consistently following the established policy as a means to reduce liability).

150. *See* FRANKE ET AL., *supra* note 135, at 29-32 (suggesting that universities develop a plan

evidenced in the *Shin* and *Schieszler* cases, students will make suicide threats to their peers and faculty prior to committing suicide. At training sessions discussed above, both students, faculty and residence life staff should be made aware of the plan to be followed when a student makes a suicide threat. Any threat that is either made or reported to anyone on campus should be relayed to a specific designated administrator, most likely the dean of students or similar position.[151] This dean will bear the responsibility of contacting the student immediately to ensure the short-term safety of the student and to make arrangements for an appointment in the counseling center in addition to documenting the threat and contacting the primary treating clinician for that student (assuming the student has been to the counseling center before). After making a suicide threat, the student should be seen by a clinician as soon as possible for an evaluation of the severity of the threat and analysis of the appropriate response. The clinician should then report back to the administrator to offer an assessment and recommendation regarding treatment.

If, after meeting with the student, the clinician does not fear for the immediate well-being of the student, the counselor may develop an appropriate treatment response including regular appointments in the counseling center. However, if the clinician is afraid for the student's well-being, the student should not be left unattended,[152] and the clinician should contact the dean regarding decisions related to the student's studies, residence life, and immediate plans for ensuring the student's safety.

If a student makes more than one reported suicide threat, the dean and counseling center should schedule a meeting for the sole purpose of discussing the well-being of the student and the need for immediate intervention. In both *Schieszler* and *Shin*, the student made more than one reported threat, but the administrators and counselors failed to develop appropriate means for preventing the student's death.[153] When a student has made more than one suicide threat and the student's condition does not show signs of improvement, the treating team should consider contacting the parents and/or the possibility of sending the student home for the duration of the semester. Involving the parents or guardians at this stage makes them aware of their child's condition and allows the parent to

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to address suicidal students and make it readily available). The Suicide Prevention Resource Center offers several ideas to implement such a plan. *See generally* SUICIDE PREVENTION RES. CTR., *supra* note 25.

151. *See* FRANKE ET AL., *supra* note 135 (recommending universities to "designate a specified person" to communicate with the student).

152. *See* Lake & Tribbensee, *supra* note 3, at 156 (asserting that often "suicides can be prevented by an effective, appropriate and timely intervention"). Perhaps the suicide in *Shin* could have been prevented. Although the physicians left Elizabeth a message that they planned to admit her to a program the following day, they did nothing to ensure her immediate safety. Shin v. Mass. Inst. of Tech., No. 02-0403, 2005 Mass. Super. LEXIS 333, at *13 (June 27, 2005).

153. In *Schieszler*, Frentzel wrote at least three notes expressing his intent. Schieszler v. Ferrum Coll., 236 F. Supp.2d 602, 605 (W.D. Va. 2002). In *Shin*, Elizabeth made several threats that were reported to administrators. *Shin*, 2005 Mass. Super. LEXIS 333, at *4-11.

be involved in the decision to keep the child in school or send him home until his condition has improved. However, universities need to be mindful that contacting the parents and sending students home may conflict with patient confidentiality and other federal regulations discussed in Part IV.[154] Regardless, when students have made repeated suicide threats, have been under constant care with little or no improvement, and can not be trusted not to harm themselves, it is likely in the best interest of both the university and the student to send them home.

E. Identify Students Pre-disposed to Commit Suicide

Entrance surveys as a part of freshman or transfer orientation (after students are admitted) or surveys for students who visit the health center have been suggested as a means of identifying potentially volatile students and students who might need to be monitored throughout their tenure.[155] This may prove to be a fruitful means of identifying suicidal students and those suffering from depression, but universities need to be cautious that they do not violate student confidentiality.

F. Removing Foreseeable Hazards

As part of a comprehensive approach to alleviate foreseeable harm on campus, universities should remove any hazards that have the potential to serve as a "means of suicide."[156] This may include the elimination of "access to handguns, drugs, and other common means of suicide."[157] Additionally universities may consider "restricting access to high places on or near campuses."[158]

G. Stay Current

Until recently, universities were hard pressed to find resources and effective strategies for suicide prevention.[159] Increasing concern for the well-being of

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154. *See, e.g.*, Bombardieri, *supra* note 5 (noting that sending students home may conflict with the Americans with Disabilities Act).

155. *See* SUICIDE PREVENTION RES. CTR., *supra* note 25, at 18, 20 ("A screening instrument might be administered at colleges and universities as part of the first year orientation and the collection of health-related information about students."); *see also* Ross & Rogers, *supra* note 2 (noting that, "[S]creening students for depression as they enter the University [can] also help to minimize suicide on campus.").

156. SUICIDE PREVENTION RES. CTR., *supra* note 25, at 23; *see also* Lake & Tribbensee, *supra* note 3, at 154.

157. SUICIDE PREVENTION RES. CTR., *supra* note 25, at 23.

158. *Id.*

159. *See* Lake & Tribbensee, *supra* note 3, at 153. Lake and Tribbensee note that in the past the development of suicide prevention programs was impaired because there was not a consistent model to follow. *Id.* However, as discussed above, recent federal funding in this area has produced

college students has recently prompted discussion, research, and funding to address the best means of preventing college suicide.[160] It is important for universities to take advantage of the numerous opportunities and resources available to them and to stay abreast of research developments. One opportunity is a grant program established by the federal government through the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Division.[161] This grant, the Campus Suicide Prevention Grant, will award $3 million through individual grants of $75,000 to private and public colleges and universities "to assist colleges and universities in their efforts to prevent suicide and attempted suicide, and to enhance services for students with mental health problems such as depression and substance abuse that put them at risk for suicide or suicide attempts."[162] Grant recipients can use these funds to assist in enhancing or creating training programs, suicide prevention hot-lines, and literature for distribution.[163]

There are also several programs and conferences that specifically address suicide prevention. University student services staff and the residence life staff should consider attending suicide prevention conferences where the latest research will be presented and where they will have the opportunity to discuss prevention strategies with other university employees.[164] Universities should use these events to regularly re-evaluate their suicide prevention plans.

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models such as those offered in the Suicide Prevention Resource Center's report. *See supra* note 132.

160. The Jed Foundation is a driving force in developing and researching campus suicide prevention programs. The foundation was established in 2000 by Phil and Donna Satow in response to the suicide of their son who was a college student. "The Jed Foundation was established in order to prevent suicide on college campuses and focus on the underlying causes of suicide." The Jed Foundation, Welcome to The Jed Foundation, http://www.jedfoundation.org (last visited Jan. 8, 2007). The Foundation collaborates with university administrators, government players, clinicians, and scientists to "design effective prevention programs that reflect the best in current thinking." *Id.* Its web-site offers a variety of services and information designed to assist universities and individual students in suicide prevention: http://www.jedfoundation.org.

161. *See* Substance Abuse and Mental Health Services Administration, Campus Suicide Prevention Grants, http://www.samhsa.gov/grants/2005/nofa/sm05015_campus.aspx (last visited Jan. 8, 2007).

162. Dep't of Health and Human Serv., Substance Abuse and Mental Health Services Administration, *Campus Suicide Prevention Grants*, (Initial Announcement), RFA SM-05-015, Catalogue of Federal Domestic Assistance (CFDA) No.: 93.243, page 5, *available at* http://www.samhsa.gov/Grants/2005/nofa/sm05015_campus_suicide.doc (last visited Jan. 8, 2007).

163. *Id.*

164. The University of Virginia sponsored a conference on Suicide, Violence, and Disruptive Behavior on University Campuses" on June 12-13, 2005. *University of Virginia Sponsors June 12-13 Conference on Suicide and Related Issues on University Campuses*, UNIV. OF VA. NEWS, June 9, 2003, http://www.virginia.edu/topnews/releases2003/suicide-june-9-2003.html. Over 300 clinicians and student affairs personnel registered. *Id.*

V. LEGAL CONSIDERATIONS

As universities implement and alter existing suicide prevention plans, they are likely to encounter three specific legal issues discussed below. These issues will force universities to navigate a fine line between protecting the well being of students (and shielding themselves from liability) and respecting the rights and interests of students as adult members of the educational institution.

A. Sending Students Home

Following the *Shin* decision, concerns have been voiced that universities fearing liability will now require students to take a medical leave and return home at the first sign of mental illness or depression.[165] Pavela has noted such a trend on college campuses, and has cautioned against it: "If administrators overreact to these cases by routinely removing students, then they are jumping out of the frying pan and into the fire[.]"[166] Pavela is referencing the legal trouble universities may encounter if they violate the requirements of the Americans with Disabilities Act ("ADA"),[167] which mandates that schools intensely review an individual's record prior to sending a student home.[168] Universities could open the door to an entirely different set of problems and potential litigation if they do not thoroughly review a student's situation prior to dismissing a student.

The ADA mandates that qualified persons (including faculty, staff and students) will not be discriminated against "on the basis of their disability."[169] The ADA defines persons with disabilities as "those with 'physical or mental impairments which substantially limit one or more . . . major life activities, [those with] a record of such an impairment, or [those who are] regarded as having such an impairment.'"[170] There are only a limited number of cases which address whether mental illness qualifies as a disability as it relates to higher education.[171] However, the majority of these cases suggest that where a psychiatric condition is the cause of "misconduct or deficiencies" the university is not obligated to make related accommodations.[172]

Nonetheless, to insulate against controversial decisions, universities should provide the student with due process including "notice of pending withdrawal"

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165. *See* Hoover, *supra* note 5.

166. Bombardieri, *supra* note 5.

167. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

168. *See* Bombardieri, *supra* note 5.

169. Laura F. Rothstein, *The American with Disabilities Act: A Ten-year Retrospective: Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241, 245 (2000).

170. *Id.* at 247 (quoting 29 U.S.C. § 705(20)(B) (2000); 42 U.S.C. § 12102(2) (2000)) (alterations in original).

171. *Id.* at 259.

172. *Id.* For example, a court held that "it was not reasonable to accommodate a masters degree candidate with a panic disorder by waiving class attendance and allowing him to attend classes by phone." *Id.* (citing Maczaczyj v. New York, 956 F. Supp. 403, 409 (W.D.N.Y. 1997)).

and an "opportunity to be heard on the matter."[173] Additionally, prior to sending students home, administrators should secure evidence that the student is a direct threat, defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[174] A direct threat is comprised of four requirements: 1) a "[h]igh probability of substantial harm"; 2) an "[i]ndividualized and objective assessment of student's ability to safely participate in school's program"; and 3) an "[a]ssessment must be based on reasonable medical judgment relying on most current medical knowledge or best available objective evidence."[175]

Beyond ADA and other regulations, there is also an argument that public policy reasons support retaining suicidal students at the university. As one commentator has suggested: "[s]tudents are not well served by . . . automatic medical leaves [that] return them stigmatized into families that may be chaotically disorganized... a supportive campus setting enables them to continue their studies while receiving treatment."[176]

In each of the above cases, the university could have avoided the risk of liability if the students been removed from school. Consequently, there will be times when it is in the best interest of both the student and the university for the student to take a leave from school (or alternatively be withdrawn in the event that they do not leave voluntarily). However, such a decision should not be approached lightly. The administrator should be sure that all of the necessary elements of a direct threat have been adequately documented and that there is sufficient evidence to support his/her decision in the event that either the parents or the student contest the decision of the administrator. Furthermore, it should be apparent that the student's best interest will be served by sending the student home.

B. Student Confidentiality

In all three of the above cases the student exhibited suicidal tendencies while on campus, and in all three cases the parents or guardians were not contacted when the student's deteriorating condition became apparent.[177] In both *Jain* and *Shin*, the parents asserted that the outcome may had been different had they been contacted regarding their child's behavior and given the opportunity to

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173. FRANKE ET AL., *supra* note 135, at 25. "Emergency interim withdrawal is permitted without process *provided* that process is provided after withdrawal." *Id.*

174. 29 C.F.R. § 1630.2(r) (2000).

175. FRANKE ET AL., *supra* note 135, at 23.

176. Alan Lipschitz, *College Student Suicide*, http://www.afsp.org/research/articles/lipsch2.html (last visited Jan. 8, 2007).

177. Elizabeth's parents were contacted on two occasions with Elizabeth's consent, but they claim when they visited her the day before her death that they were unaware of her deteriorating condition despite the numerous threats she had made recently to administrators. Sontag, *supra* note 10. In *Jain*, the court said, "Sanjay's parents and family were unaware of [his] difficulties." Jain v. Iowa, 617 N.W.2d 293, 295 (Iowa 2000).

intervene.[178] However, universities are hesitant to violate student confidentially and are often prohibited from releasing pertinent information by federal regulation, local law, or campus policy.

Universities are bound to protect student confidentiality by the requirements of what was formerly called the Buckley Amendment,[179] now entitled the Family Education Rights and Privacy Act of 1974 ("FERPA").[180] FERPA is applicable to all public and private educational institutions that receive federal funding.[181] Because the vast majority of higher education institutions receive federal funding, nearly all higher education institutions are subject to its requirements.[182] Under FERPA, these institutions must ensure "compliance with certain privacy-related practices. Parents (and students [if] over the age of 18) must be given the right to inspect and review the education records of their children (or themselves)."[183] Additionally, FERPA serves to protect one's right to privacy by restricting the disclosure of information to third parties without consent.[184] Furthermore, a record must be maintained that details all outside parties that have "requested or obtained a student's education records."[185]

Among the education records that parents are allowed to access are "records, files, documents and other materials that contain information directly related to a student and maintained by a covered institution or its agent."[186] Types of records, however, are excluded from the educational record and subsequently from automatic access to parents including "records maintained by the law enforcement unit of an institution, employee records and certain *medical related records*."[187] Specifically, the statute excludes from the educational record all records:

> which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity,

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178. In *Jain*, "the only specification of negligence seriously advanced by plaintiff was his claim that Sanjay's death resulted from the university's failure to notify his parents of his earlier suicide attempt." *Jain*, 617 N.W.2d at 296. The Shins stated: "How we wish, more to the point, that we had been told." Sontag, *supra* note 10.

179. *Disclosure of Student Records: A Comprehensive Checklist*, 3 CAL. SPECIAL EDUC. ALERT (May 1997); *see also* MATTHEW BENDER & COMPANY, INC., 5-13 EDUC. L. § 13.04, 3(a) (2005) (detailing the history of FERPA).

180. 20 U.S.C. § 1232g (2000).

181. Gary Saidman, *Overview of Key Federal Privacy and Information Security Statutes*, 4 E-COMMERCE L. REP. 2, 6 (2002).

182. MATTHEW BENDER & COMPANY, INC., *supra* note 179, § 3(b)(i).

183. Saidman, *supra* note 181, at 6.

184. *See id.*; *see also* MATTHEW BENDER & COMPANY, INC., *supra* note 179, § 3(a).

185. Saidman, *supra* note 181, at 6.

186. *Id.*; *see also* MATTHEW BENDER & COMPANY, INC., *supra* note 179, § 4(b)(i) (noting that "most records related to a student will be included").

187. Saidman, *supra* note 181, at 6 (emphasis added).

> and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.[188]

The Act "does not consider treatment records education records for the purposes of FERPA if they are not available to anyone other than persons providing treatment."[189] However, if the treatment record is disclosed, for any purpose (including a student's requested access to treatment records), then it will become a part of the educational record and be subject to the Act's provisions.[190] Because treatment records are not automatically included in the educational record, parents are not guaranteed access to them. Additionally, under FERPA, non-recorded information, including all verbal communications, is not an educational record and therefore not readily available for parental access.[191]

Therefore, individual state law will control university or clinician policies regarding the release of student treatment information or verbal communication to parents and third parties.[192] Local law differs by jurisdiction, but in many jurisdictions conversations between a student and a physician, or mental health professional are privileged and therefore cannot be revealed to parents or other third parties requesting access without the express permission of the patient.[193]

FERPA also includes an exception for drug and alcohol disclosures, which may not be included in the educational record because they are criminal records. The Act does not:

> prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records,[194]

assuming the student is not yet twenty one years of age and the institution has determined that the student "committed a disciplinary violation with respect to such use or possession."[195] Therefore, if a student has violated a law relating to alcohol or a controlled substance, the school may contact the parents even if the information is not contained in the education record. This provision may prove important if it is established that a student with mental illness or suicidal

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188. 20 U.S.C. § 1232g(a)(4)(B)(iv) (2000).

189. MATTHEW BENDER & COMPANY, INC., *supra* note 179, § 4(b)(vi).

190. *Id.*

191. FRANKE ET AL., *supra* note 135, at 18.

192. *Id.*

193. *Id.*

194. 20 U.S.C. § 1232g(i)(1) (2000).

195. *Id.* § 1232g(i)(1)(A)-(B).

tendencies has abused medications or other controlled substances.

FERPA contains an important provision regarding the release of information that is contained in the educational record. Under FERPA, if the student's conduct "posed a significant risk to the safety or well-being of that student, other students, or members of the school community," the institution is permitted to disclose the relevant information to "teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student."[196] If a student has exhibited troubling behavior including a threat to themselves (or their classmates), the university should inform faculty and staff of the behavior so they can assist the school in monitoring the student.

In the future, universities are going to have to choose between violating the confidentiality of students and responding to the potential harm, including legal liability that could result by not informing parents or guardians of the student's condition.[197] In developing protocols for contacting parents, universities should "balance [the] risk of privilege violation against potential harm to students."[198] It is apparent that there will be circumstances where the risk of violating confidentiality will be trumped by the student's well being.

C. In Locus Parentis

Traditionally, courts "found the college stood *in loco parenti*—literally in the place of the parent. . . [a]s the guardian of the students' health, welfare, safety and morals."[199] But the Vietnam era and the campus revolutions of the 1960s prompted a change in America's perception of college students.[200] Students came to be viewed as adults in their own right, rather than children under the care of their parents.[201] "The passage of the 26th Amendment to the U.S. Constitution lowering the voting age to 18 added to this feeling of student responsibility."[202]

Identifying students as adults prompted changes in the courts' perception as well, and therefore in recent decades, the university has not been regarded as standing *in locus parentis*.[203] This view was personified in *Schieszler v. Ferrum*,

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196. *Id.* § 1232g(h)(1)-(2).

197. Lake and Tribbensee offer a valuable discussion of the case law regarding parental notification and policy considerations. Lake & Tribbensee, *supra* note 3, at 137-53. Specifically, they comment that "administrators in a university setting must consult with appropriate professional staff to assess whether notification is in the best interest of the student and whether such notification is expected to protect the student from suicide or suicidal ideation." *Id.* at 150.

198. FRANKE ET AL., *supra* note 135, at 18.

199. Robert A. Clifford, *Clearing the Haze Around College Hazing*, CHI. LAW., Sept. 8, 1996, at 8.

200. *Id.*

201. *Id.*

202. *Id.*

203. *See* Jennifer L. Spaziano, *It's All Fun and Games Until Someone Loses an Eye: An Analysis of University Liability for Actions of Student Organizations*, 22 PEPP. L. REV. 213, 226

where the court specifically said, "[t]he instant case does not involve a minor, and therefore, strictly speaking, no duty arises from an *in loco parentis* relationship."[204] However, it has been noted that recent cases have caused "commentators to consider the re-emergence of the *in loco parentis* doctrine."[205] It has also been argued that "[m]ore and more students are looking to higher educational institutions for help with other parental [] aspects of their lives- tuition assistance, job hunting and establishing their careers."[206] As students become more dependent on their institution to serve as pseudo-parents in many respects, "should the institutions that house and educate these teenagers and young adults ultimately be responsible for the student's negligent actions?"[207] If universities have a duty to reduce and regulate "dangerous activities peculiar to the college environment[,]" then that likely "means greater supervision of the students, [and] perhaps we've just come full circle" in re-assuming the role of *in-locus parentis*.[208]

As the issue pertains to suicidal students, what is the proper role of the university? The university needs to consider the implications of assuming a parental role in the lives of students. The more constant supervision and care the university provides suicidal students and students suffering from mental illness, the closer they have become to assuming the role of *in locus parentis* and opening a new door to liability.[209] However, the alternative is not very appealing- to remain detached from the students in the most need of care. Perhaps it is best for universities to play an active role in lives of needy students but with a firm and consistent suicide prevention policy to safeguard against liability.

CONCLUSION

Although the issue of suicide liability remains both uncertain and concerning for universities, universities should capitalize on the lessons that can be learned

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(1994) (noting that the doctrine of *in locus parentis* was abandoned after Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979), where the appellate court held that the college did not owe a duty of custodial care to the student).

204. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 608 (W.D. Va. 2002).

205. Spaziano, *supra* note 203, at 227.

206. Clifford, *supra* note 199, at 8.

207. *Id.*

208. *Id.*

209. *See generally* Spaziano, *supra* note 203. Spaziano addresses the tension that universities face between direct control and a hands off approach related to on-campus student organizations and liability. She asserts that there are two ways that a university can avoid liability with student organizations: 1) "by denying any relationship between itself and its student organizations, or choosing to maintain control over its organizations but [limiting] liability through implementation of carefully conceived regulations." *Id.* at 244. She concludes that it is in the best interest of the university to assume a direct control approach. She determines that this is the "more definite approach and the university, the organization, the student, and the courts know exactly where the university stands in relation to the organization." *Id.* at 245.

from the *Shin* case. Universities have notice that in future cases a special relationship may be found between a university or university administrators and a student where the student's death is foreseeable. To avoid such liability, universities need to be proactive in establishing a "multi-faceted and comprehensive approach to suicide prevention" that will be consistently followed by all members of the university community.[210] Institutions should make communication, planning, and training pivotal parts of the suicide prevention plan. In designing suicide prevention plans, universities must take into consideration the legal issues related to sending students home, student confidentiality, and the doctrine of *in locus parentis*. Finally, because the issue of campus suicide is attracting attention from a variety of fields, universities should stay abreast of the latest research, relevant cases, and other developments to ensure that the their programs are the most effective means of suicide prevention.

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210. Health and Human Development Programs, *supra* note 1 (quoting Dr. Lloyd Potter, Director of the Suicide Prevention Resource Center).

YOU CAN'T WIN 'EM ALL: HOW THE NCAA'S DOMINANCE OF THE COLLEGE BASKETBALL POSTSEASON REVEALS THERE WILL NEVER BE AN NCAA FOOTBALL PLAYOFF

ERIC THIEME*

INTRODUCTION

The debate over how to decide the Division I-A[1] college Football National Championship has long been raging and seems to intensify each year.[2] Division I-A College Football is the only National Collegiate Athletic Association ("NCAA") sport that does not crown a champion through the use of an NCAA sponsored playoff system.[3] Instead, schools, through their respective conferences, along with bowl game organizers and television networks have formed an agreement known as the Bowl Championship Series ("BCS") through which a national champion is decided.[4] The agreement involves the use of human polls and a computer generated formula to rank teams and then place the two top-ranked teams in a postseason bowl game to decide the national championship.[5] The system has been hailed in years, such as 2005, when the top two teams are both undefeated and there are no other undefeated teams in the top 25. However in years such as 2004, when there are more than two undefeated teams ranked in the top-five in the country, the BCS has been severely criticized.[6]

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* J.D. Candidate, 2007, Indiana University School of Law—Indianapolis; B.S., 2003, Miami University, Oxford, Ohio. I would like to thank my loving wife, Ries, for her constant support and the Jarvis family for entertaining her while I wrote this. This Note was composed primarily between the 2005 and 2006 college football seasons.

1. Effective December 15, 2006, the NCAA changed the name of Division I-A football to "Football Bowl Subdivision" or "FBS." David Albright, *NCAA Misses the Mark in Division I-AA Name Change*, ESPN.COM, Dec. 15, 2006, http://sports.espn.go.com/ncf/columns/story?id=2697774. The name change likely adds confusion to an already complex naming scheme. *Id.* To avoid confusion, "FBS" will continue to be referred to as Division I-A throughout this Note.

2. *See, e.g.*, Chuck Klosterman, *No College Football Playoff, Please*, ESPN.COM, Jan. 2, 2007, http://sports.espn.go.com/espn/page2/story?page=klosterman/070103; Associated Press, *Strong Matchups Back Up BCS Process*, ESPN.COM, Dec. 4, 2005, http://sports.espn.go.com/ncf/news/story?id=2247858&campaign=rss& source=ESPNHeadlines; Associated Press, *Congress to Look into "Deeply Flawed" BCS System*, ESPN.COM, Dec. 2, 2005, *available at* http://sports.espn.go.com/ncf/news/story?id=2245440 [hereinafter *Deeply Flawed*].

3. Metro. Intercollegiate Basketball Ass'n v. NCAA (*MIBA I*), 337 F. Supp. 2d 563, 565 (S.D.N.Y. 2004).

4. Jodi M. Warmbrod, Comment, *Antitrust in Amateur Athletics: Fourth and Long: Why Non-BCS Universities Should Punt Rather Than Go for an Antitrust Challenge to the Bowl Championship Series*, 57 OKLA. L. REV. 333, 347 (2004).

5. Bowl Championship Series, About the BCS, http://www.bcsfootball.org/bcsfb/about (last visited Jan. 17, 2007).

6. The conclusion of the 2005 regular season saw Southern California and Texas both

Many critics argue that the current postseason bowl system produces unsatisfactory results and will be flawed until some form of a playoff system is instituted.[7]

The bickering and unsettledness of the National Championship in Division I-A College Football is in stark contrast to that of the Division I Men's College Basketball Championship.[8] Through a playoff system, the NCAA Division I Men's Basketball Championship is decided on the court and there is little left to argue about once the tournament is over. The tournament is a huge commercial success each year and is wildly popular among fans.[9] Over the years, the NCAA tournament has faced competition from the National Invitational Tournament ("NIT"),[10] but has managed to maintain its place as the premier postseason college basketball tournament.[11] However, the NCAA tournament's popularity and the simplicity of having a playoff to determine the national championship were not achieved overnight and not without the NCAA employing some cutthroat tactics.[12]

The latest cutthroat tactic to be employed by the NCAA was known as the "Commitment to Participate Rule." The rule required any NCAA team that was invited to the NCAA tournament to either attend the NCAA tournament or abstain from postseason play all together.[13] The rule was challenged in court by the organizers of the NIT and the case was settled with the NCAA purchasing the NIT.[14] The district court opined that the "Commitment to Participate Rule"

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undefeated and ranked number one and number two. Mike Jensen, *Football Gets a True Title Game*, PHILADELPHIA INQUIRER, Jan. 4, 2006. At the conclusion of the 2004 regular season Auburn, Utah, Oklahoma, and Southern California were all undefeated and ranked in the top-five. Southern California defeated Oklahoma in the national title game, with Auburn and Utah wining their separate postseason games but never having a shot to compete for the National Championship. Bowl Championship Series, History of the BCS, http://www.bcsfootball.org/bcsfb/history (last visited Jan. 17, 2007) [hereinafter History of the BCS].

7. *See* Jensen, *supra* note 6; *see also Deeply Flawed*, *supra* note 2 (criticizing the college football postseason).

8. The NCAA Men's Division I College Basketball Tournament has been crowning a National Champion through a playoff system since 1939. *MIBA I*, 337 F. Supp. 2d at 566.

9. *See* discussion *infra* Part III.

10. The NIT is a postseason basketball tournament held in New York City each year. *MIBA I*, 337 F. Supp. 2d at 566. Historically, forty teams are invited as opposed to the sixty-five that are invited to the NCAA tournament. *Id.*

11. *See generally id.* at 566-68 (explaining the rise of the NCAA tournament and the decline of the NIT).

12. The NCAA Basketball Tournament started in 1939; however, one year prior to that, in 1938, the National Invitational Tournament was founded. *Id.* at 566. The two tournaments have a tumultuous past. *See* discussion *infra* Part III.

13. *MIBA I*, 337 F. Supp. 2d at 567.

14. Gary T. Brown, *Questions Being Answered After NCAA's NIT Purchase, Meaningful Enactments are on the Way*, THE NCAA NEWS, Sept. 12, 2005. The district court issued two written opinions in response to motions for summary judgment. *MIBA I*, 337 F. Supp. 2d at 563;

might be a violation of the Sherman Anti-Trust Act.[15]

It is this type of rule, and moreover the court's likely treatment of this type of rule, that reveals why the NCAA will not be able to organize a college football playoff. The NCAA currently lacks control of the college football postseason and would likely only be able to gain control through the use of the "Commitment to Participate Rule" or the institution of a similar rule. In all likelihood such a rule would fail under antitrust scrutiny by the courts.

This Note compares the development of postseason play in college football and college basketball and the manner in which courts have applied antitrust law to both. Further this Note sets out to demonstrate that, despite annual calls by fans and journalists for a college football playoff, it would be impossible for the NCAA to organize a Division I-A College Football playoff to determine a national champion. *The NIT Case* provides evidence of what is required for the NCAA to maintain control over a sport's postseason and how those measures are susceptible to antitrust challenges. This Note argues that the NCAA lost control over the college football postseason in the 1984 landmark case of *NCAA v. Board of Regents of the University of Oklahoma*,[16] and that the only way the NCAA could regain control would be to employ methods that *The NIT Case* has shown would likely be deemed anti-competitive by the courts.

Part I briefly explains how the NCAA began, what it does, its structure, and views on its role and purpose. Part II recounts the history and development of the college football postseason and summarizes its current situation. Part III briefly sets out the roots of the NCAA and NIT Basketball Tournaments and highlights the NCAA's use of its power to lessen the importance of the NIT. Part IV examines antitrust laws and their application to college athletics, focusing on the recent culmination of the NCAA/NIT rivalry in *The NIT Case*.[17] Part V then argues that the only way the NCAA would be able to take control over the college football postseason through a playoff would be to use the "Commitment to Participate Rule" or to institute a similar rule. However, *The NIT Case* has shown that this would likely run afoul of the Sherman Anti-Trust Act. Further, the BCS is not likely to succumb to an NCAA buyout like the NIT did. Therefore, an NCAA organized Division I-A college football playoff is not possible. Part VI concludes and offers a few brief suggestions for the future of postseason college football.

Metro. Intercollegiate Basketball Ass'n v. NCAA (*MIBA II*), 339 F. Supp. 2d 545, 551-52 (S.D.N.Y. 2004). For purposes of this Note the two opinions shall be collectively referred to as *The NIT Case*.

15. *MIBA II*, 339 F. Supp. 2d at 551-52.

16. NCAA v. Bd. of Regents of the Univ. of Okla. (*Bd. of Regents*), 468 U.S. 85 (1984); *see also* Steve Wieberg, *The Runaway Train*, USA TODAY, Nov. 4, 2003, at 1C (noting the importance of *Board of Regents* to the landscape of college football) [hereinafter Wieberg, *The Runaway Train*].

17. *MIBA II*, 339 F. Supp. 2d at 545; *MIBA I*, 337 F. Supp. 2d at 563.

I. THE NCAA

At the turn of the last century, college football was not regulated, and player deaths and serious injuries were not uncommon.[18] This was clearly unpleasant and not the way the game was meant to be played, but if a team reduced the violence and played "fair," that team would likely lose. On the other hand, if play continued in this fashion then the violence was likely to escalate until the game destroyed itself.[19] College football teams were stuck in a "race to the bottom" or a "prisoner's dilemma" and collective action through a governing body was needed to save the sport.[20] Thus, in 1906, with a little nudging from President Theodore Roosevelt, the NCAA's predecessor institution met to establish standardized rules to promote safety in the game of football.[21] The group consisted of representatives of sixty three colleges and universities.[22] The NCAA adopted its current name in 1910 and organized its first national championship in 1921.[23]

Since its humble beginnings as a discussion group and rule-making body, the NCAA has grown to include over 1200 colleges and universities.[24] It regulates twenty-three sports, conducts eighty-nine postseason championships, and promulgates rules and regulations that govern not only how sports are played on the field, but also what schools and athletes can do off the field.[25] The NCAA is structured as a voluntary, non-profit organization and schools within the NCAA are classified as either Division I, II, or III.[26] Division I schools are

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18. John L. Fizel & Randall W. Bennett, *College Sports*, *in* THE STRUCTURE OF AMERICAN INDUSTRY 323, 325 (Walter Adams & James Brock eds., 10th ed. 2001).

19. *Id.*

20. *Id.*

21. National Collegiate Athletic Association, The History of the NCAA, http://www.ncaa.org/about/history.html (last visited Nov. 20, 2006).

22. *Id.*

23. *Id.* The championship was track and field. *Id.*

24. *MIBA I*, 337 F. Supp. 2d 563, 565 (S.D.N.Y. 2004).

25. *Id.* Each year the NCAA publishes a manual that is adopted by all member institutions as a condition precedent to that school participating in NCAA sanctioned athletic contests. The manual governs scholarships and other assistance that can be given to student-athletes and prohibits student-athletes from competing at a professional level in their respective sports while attending college. *See* NCAA MEMBERSHIP SERVICES STAFF, 2005-06 NCAA DIVISION I MANUAL, July 2005.

26. National Collegiate Athletic Association, What's the Difference Between Divisions I, II and III?, http://www.ncaa.org/about/div_criteria.html (last visited Nov. 21, 2006) [hereinafter What's the Difference]. Division I schools must "sponsor at least seven sports for men and seven sports for women," must compete against mainly Division I opponents, and must provide a minimum amount of financial aid for student-athletes. *Id.* Division II schools must have at least four sports for men and four sports for women and must compete against Division II or I opponents. *Id.* While Division I and II schools can provide athletic scholarships for their students, Division III schools are separated by the fact that they do not grant scholarships based on athletic ability. *Id.* As of December 15, 2006, the NCAA now refers to Division I-A as "Football Bowl

subdivided into I-A, or I-AA for football purposes based on minimum attendance requirements at football games.[27] Within each division, schools have voluntarily organized themselves into conferences.[28] According to the NCAA, its current purpose is to promote "fair, safe, equitable, and sportsman-like" conduct while being committed to the values of balancing "academic, social, and athletic experiences," "enhancing the sense of community" at member institutions, and providing autonomy for member institutions and member institutions' presidents.[29]

For policy and rule making purposes, the NCAA was originally a one-school one-vote democracy, but in 1997 its structure at the Division I level was changed to a representative democracy.[30] Today, a board of directors comprised of fifteen members, each from a member school, is elected by a vote of all member schools.[31] It is required that nine of the fifteen directors come from Division I-A schools.[32] This results in schools with large athletic programs, mainly football, influencing much of the decision making process.[33]

While the core values of the NCAA of today sound similar to those of the "discussion-group" and "rule-standardizing" NCAA of its founding days, many argue that the association's purpose has changed and its focus is no longer on standardizing rules, but rather on "instituting the foundations for cartel control of college sports."[34] The modern NCAA has been characterized as a cartel that limits both inputs and outputs.[35] The traditional argument is that the NCAA is a group comprised of entities (the member schools) that each produce output of a product in the form of athletic competition.[36] That product, or output, has a value that is measurable in terms of the value of television contracts to broadcast games, ticket sales to view the games, licensing fees for school-related sports apparel, and the overall increase in a school's notoriety that comes with having successful athletic programs. To produce this output of athletic competition there are many required inputs: athletic talent from the athletes, quality coaching

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Subdivision" and Division I-AA as "Football Championship Subdivision." Albright, *supra* note 1.

27. What's the Difference, *supra* note 26. To qualify for Division I-A, a school must have an average attendance of 15,000 people per home game. *Id.* Division I-AAA status is typically reserved for schools that do not have, or place little emphasis on, football. *Id.*

28. *MIBA I*, 337 F. Supp. 2d at 565. Schools of the same conference tend to be similar in size and geographic location. *Id.*

29. National Collegiate Athletic Association, Our Mission, http://www2.ncaa.org/about_ncaa/overview/mission.html (last visited Nov. 20, 2006).

30. Joel G. Maxcy, *The 1997 Restructuring of the NCAA: A Transactions Cost Explanation*, *in* THE ECONOMICS OF COLLEGE SPORTS 11, 17-18 (John Fizel & Rodney Fort eds., 2004).

31. *Id.*

32. *Id.*

33. *Id.*

34. Fizel & Bennett, *supra* note 18, at 325.

35. Maxcy, *supra* note 30, at 13.

36. Fizel & Bennett, *supra* note 18, at 326.

from the coaches, and the facilities and equipment necessary to conduct athletic events. In a cartel, firms collude to coordinate actions and agree to limit output and control the cost of inputs in order to raise prices and overall revenues.[37] The NCAA reduces the cost of inputs by prohibiting schools from paying their athletes and attempting to limit the number of coaching positions and coach pay,[38] while restricting output through limits on the number of games that can be played in a season and, until recently, limiting the number of times a school could be on television.[39]

Others argue that the NCAA is a political body that both provides public goods and redistributes wealth.[40] This argument traditionally proceeds along the lines that the NCAA schools voluntarily agree to be governed by the NCAA rules and guidelines so that the public good of collegiate athletics can be produced[41] and these rules, while sometimes limiting what individual schools can achieve, ultimately result in a level playing field for all schools to the betterment of college sports.[42]

This all matters because whenever the NCAA acts, for example by instituting the "Commitment to Participate Rule" or organizing a playoff, that action can be viewed as either an attempt to restrict inputs or outputs to increase revenue for the controlling schools, or as the result of a legislative process that creates rules necessary for collegiate athletics to flourish. The actual role and purpose of the NCAA, or one's perception of the NCAA's role and purpose, will affect whether one views the NCAA's actions as for the greater good of college athletics[43] or to increase the revenues of its controlling members.[44] The two views are not always at odds with each other and one view is not necessarily better than the other.

II. THE COLLEGE FOOTBALL POSTSEASON

Division I-A College Football has never had a postseason tournament or a

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37. WILLIAM J. BAUMOL & ALAN S. BLINDER , MICROECONOMICS: PRINCIPLES AND POLICY 237-38 (10th ed. 2006).

38. *See generally* Law v. NCAA, 134 F.3d 1010, 1024 (10th Cir. 1998) (upholding the permanent injunction against promulgation or reenactment of NCAA rule limiting compensation of certain coaches).

39. *See* Fizel & Bennett, *supra* note 18, at 325-27. Granted athletes are given scholarships that have tremendous *value*, but the marginal *cost* of a scholarship (the cost to have one more student in class and the cost to feed one more student) is virtually zero. *Id.*; *see also* Robert J. Barro, *The Best Little Monopoly in America*, BUSINESSWEEK, Dec. 9, 2002, at 22 (noting the NCAA's ability to reduce the cost of inputs by not paying athletes).

40. Maxcy, *supra* note 30, at 13.

41. Without NCAA guidelines we would be back to the days of violent deaths in college football.

42. The rich schools cannot attract the best athletes by paying higher wages because no schools pay athletes. *See* Fizel & Bennett, *supra* note 18, at 325-26.

43. To standardize football rules to promote safety.

44. To eliminate competition through the "Commitment to Participate Rule."

playoff system.[45] Instead, historically, conferences have entered into three-way agreements with each other and various organizers of bowl games for teams from the respective conferences to play each other in designated bowl games at neutral sites.[46] The first bowl game was played in 1902,[47] and since then more and more bowl games have formed. As of 2005, there were twenty-eight postseason bowl games.[48] The "tie-in" structure of the college football postseason resulted in great popularity;[49] however, from 1946 to 1991 the top-two ranked teams in the country only played each other on nine occasions.[50]

The infrequency of a true number-one versus number-two game in the

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45. *MIBA I*, 337 F. Supp. 2d 563, 565 (S.D.N.Y. 2004).

46. *Review of Selection Process for College Football Bowl Games: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of William Johnstone, Chairman, Rose Bowl Game Mgmt. Comm.) [hereinafter Johnstone Statement]. For example, historically an agreement existed between the Big Ten Conference (a major football conference made up of large schools from the Mid-West such as the University of Michigan, the University of Iowa, and the University of Wisconsin), the Pacific Ten Conference (another major football conference made up of large schools from the Pacific Coast such as the University of Southern California, the University of Arizona, and Stanford University), and the Pasadena Tournament of Roses Association (a group founded in 1890 by the citizens of Pasadena, California, "for the purpose of presenting a floral pageantry on New Year's Day" that later added a football game to the pageantry) whereby the champion of each conference would play in the Rose Bowl Game hosted by the Pasadena Tournament of Roses Association on New Year's Day in Pasadena, California. *Id.*

47. *Id.* The first bowl game was a 49-0 shellacking by the University of Michigan over Stanford University in the Rose Bowl Game. *Id.* The date of the first postseason bowl game is not entirely settled. Some point to an 1894 postseason game between the University of Notre Dame and the University of Chicago as the original bowl game. *College Bowl Alliance*: *Hearing Before the Subcomm. on Antitrust, Bus. Rights and Competition of the S. Comm. on the Judiciary*, 105th Cong. 41 (1997) (statement of Cedric W. Dempsey, Executive Director, NCAA).

48. *Review of Selection Process of College Football Bowl Games: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Derrick S. Fox, President, Football Bowl Ass'n) [hereinafter Fox Statement]. The twenty-eight bowl games are played in twenty-four communities across thirteen states. Virtually all of the bowl games are put on by charitable groups. In 2005, forty-eight percent of Division I-A schools participated in a bowl game, most through "tie-in" arrangements similar to that of the Rose Bowl Game whereby one conference agrees to send a team (its first place finisher, second place finisher, etc.) to play another conference's team (that conference's first place finisher, second place finisher, etc.). *Id.* The number continues to grow. In the 2006-07 bowl season twenty-seven cities hosted a total of thirty-two bowl games. Football Bowl Association, Home, http://www.footballbowlassociation.com/index.html (last visited Jan. 17, 2007).

49. Fox Statement, *supra* note 48. Bowl games that have been in existence for the past six years have seen attendance increase by 6.5% over that period and have "sold 98.5% of their capacity" for that period. *Id.*

50. History of the BCS, *supra* note 6.

college football postseason provided the force required to reshape the traditional college football postseason. In the early 1990s, conferences, bowl organizers, and television networks began discussing agreements that could produce a true national championship game.[51]

The first such agreement was known as the Bowl Coalition and was formed in 1992. The agreement paired the top two teams in national championship games in two of the three years it was in existence.[52] The agreement included four major bowl games, but did not include the Rose Bowl Game and did not abandon any of the historical "tie-in" arrangements. The result was that two major conferences (the Big Ten and the Pacific Ten) and the largest bowl game (the Rose Bowl Game) did not participate in the national championship, and the agreement broke down in January 1995.[53]

Immediately following the Bowl Coalition's breakdown, the Bowl Alliance was formed.[54] The Bowl Alliance had an advantage over the Bowl Coalition in that many of the historical "tie-in" arrangements between conferences and bowl games expired in 1995; thus, conference champions that might never have been able to meet could now be paired in a postseason bowl game.[55] However, the historically strong tie between the Big Ten, the Pacific Ten, and the Rose Bowl Game remained intact and none of the three were part of the Bowl Alliance. This made a national championship impossible if only one of the top-two teams was from the Big Ten or the Pacific Ten.[56]

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51. *Id.* Absent from this group is most notably the NCAA who did not attempt to create a playoff, although they did form a committee to look into the possibility. One possible explanation for the NCAA's inability to set up a playoff is that college football teams and conferences had the right to enter into television contracts on their own, free from NCAA regulation. This was not always the case; prior to 1984, the NCAA collectively bargained for its member schools with television networks. No school could contract with a network on its own, and revenue from NCAA football television contracts was evenly distributed among the schools. In 1977, a group of "high investment" football schools (led by the University of Oklahoma and the University of Georgia) formed the College Football Association and threatened to leave the NCAA if they were not allowed to enter into their own television contracts. The group eventually sued the NCAA and won the right for schools to individually, or through their conferences, enter into contracts for the broadcast of their football games. *See* NCAA v. Bd. of Regents of the Univ. of Okla. (*Bd. of Regents*), 468 U.S. 85 (1984). The group was also a force behind the shift from a one-vote one-school democracy in the NCAA to a representative democracy with more weight being given to the larger Division I-A schools. *See* Maxcy, *supra* note 30, at 17; *see also* Kay Hawes, *Gridiron Gridlock: Landmark Lawsuit Caused Football Television to Change Channels*, THE NCAA NEWS, Dec. 6, 1999. This Note argues that once the individual schools and conferences had the powerful bargaining chip of television rights, the NCAA began to lose its importance in the college football postseason.

52. History of the BCS, *supra* note 6.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

This ultimately led to the end of the Bowl Alliance and the formation of the BCS in 1998. "The BCS is not an NCAA organization, although each member of the BCS is a member of the NCAA."[57] The BCS is made up of eleven conferences, plus Notre Dame and 116 other universities who do not belong to a particular conference.[58] Through the use of two human voting polls and six computer polls, the BCS ranks college football teams and then places the number-one and number-two ranked teams in a bowl game to decide the national championship. The agreement also attempts to set up other competitive bowl game match-ups.[59] Four bowl games; the Rose, Nokia Sugar, FedEx Orange, and Tostitos Fiesta Bowls, made up the original BCS bowl game and each year the national championship match-up would rotate from one bowl to the next.[60] The original BCS agreement expired at the end of the 2006 bowl season (2005 regular season) and a new BCS agreement will take effect for the 2007 bowl season and last through the 2010 bowl season.[61]

Under the new BCS agreement the original four bowl games will continue to host their respective games, but once every four years the site of one of the bowl games will host an additional game called "The National Championship Game."[62] The six conferences whose champions receive automatic bids will continue to award automatic bids to the champions until the conclusion of the 2007 regular season.[63] At the conclusion of the 2007 season, conferences will be evaluated on their previous four seasons and any of the eleven Division I-A conferences will be eligible for an automatic bid for the next two seasons with the caveat that no fewer than five, and no more than seven conferences will

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57. *Review of Selection Process for College Bowl Games: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Robert Khayat, Chancellor, The University of Mississippi).

58. *Id.* Although six conferences (the Atlantic Coast Conference, Big East, Big Twelve, Big Ten, Pacific Ten, and Southeastern Conference) along with Notre Dame reap most of the benefit due to the fact that their conference champion (or Notre Dame, if they meet certain ranking and record requirements) is guaranteed a spot in one of the BCS games, these six conferences plus Notre Dame are known as the BCS "founding conferences." History of the BCS, *supra* note 6.

59. *Review of Selection Process for College Football Bowl Games: Hearing Before the Subcomm. on Commerce, Trace, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Kevin Weiberg, Coordinator, Bowl Championship Series) [hereinafter Weiberg Statement]. For example, once the National Championship Game is set, the champions of the participating conferences will be matched up in the remaining bowl games that are not hosting the national championship. Teams that have had success, but did not win their conference, are invited as "at-large" teams to fill out the remaining slots. Bowl Championship Series, Automatic Qualification Standards, http://www.bcsfootball.org/bcsfb/eligibility (last visited Jan. 17, 2007).

60. History of the BCS, *supra* note 6.

61. Bowl Championship Series, Future BCS Structure, http://www.bcsfootball.org/index2.cfm?page=structure (last visited Mar. 3, 2005) [hereinafter Future BCS Structure].

62. *Id.*

63. *Id.*

receive automatic bids.[64]

The money involved in the BCS is astronomical. The BCS does not pay individual teams, but rather the conference from which a participating team belongs.[65] Conferences then divide payouts among members, typically in equal amounts.[66] Total revenue for the 2006 BCS games is projected to be $96,160,000.[67] From that amount, $1.8 million is distributed to Division I-AA conferences to "support the overall health of college football."[68] Next, a minimum of $5,160,000 is guaranteed to so-called "mid-major" conferences for their participation in the agreement.[69] The remaining revenue is then divided into six equal shares (between $14,503,333 and $15,129,166 in 2006) and paid to the participants of the FedEx Orange, Nokia Sugar, and Tostitos Fiesta Bowls. The Rose Bowl pays its participants separately and in 2005 each Rose Bowl participant was paid $14.5 million dollars.[70] If a conference places more than one team in a BCS game, then that conference receives an additional $4.5 million, and any remaining money is divided equally among the six founding conferences.[71] A conference placing two teams in the BCS, such as the Big Ten in 2006, is estimated to receive $22,822,222.[72]

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64. *Id.*

65. Bowl Championship Series, Revenue Distribution (on file with author) [hereinafter Revenue Distribution].

66. *See* Big Ten Conference, Inc., I.R.S. Form 990 (tax year beginning July 1, 2003 and ending June 30, 2004) (on file with author) (reporting that approximately $10.6 million was distributed to each member school); *see also* Atlantic Coast Conference I.R.S. Form 990 (tax year beginning July 1, 2003 and ending June 30, 2004) (on file with author) (reporting that approximately $10 million was distributed to each school); *but see* Southeastern Conference I.R.S. Form 990 (tax year beginning Sept. 1, 2004 and ending Aug. 31, 2005) (on file with author) (showing that some conferences have more variation in their revenue distribution by reporting that amounts between $6.8 million and $10 million were distributed to member schools depending on size).

67. Revenue Distribution, *supra* note 65.

68. *Id.* There are 118 Division I-AA schools, and each receives approximately $15,254. *Id.* This number is small compared to the total BCS revenue, but considering the average Division I-AA athletic program operates at a $600,000 per year deficit every little bit helps. National Collegiate Athletic Association, Division I-AA Revenue and Expenses, at *2, http://www.ncaa.org/about/ fact_sheet.pdf (last visited Nov. 20, 2006).

69. Revenue Distribution, *supra* note 65. The "mid-major" conferences are Conference USA, the Mid-American, Mountain West, Sun Belt, and Western Athletic Conferences; there are fifty-one schools and each takes approximately $101,176. *Id.* The conferences do not have to do anything except agree to be a part of the BCS and that their schools will play in a BCS game if invited (playing in a BCS game means even more money). *Id.* An argument could be made that $100,000 for doing nothing may or may not enter into a school's decision to support or not support an NCAA football playoff.

70. Revenue Distribution, *supra* note 65.

71. *Id.*

72. *Id.*

The money involved is projected to keep growing.[73] After the 2006 regular season, a BCS participant can expect to receive $17 million for placing one team in a BCS bowl; after the 2009 season that figure will jump to $18.5 million.[74] The BCS and FOX Sports recently signed a new four-year deal that will give FOX Sports the rights to broadcast the BCS games (except for the Rose Bowl Game and the 2010 National Championship Game, which will be held at the Rose Bowl site) through 2009.[75] The deal is worth $320 million.[76]

College football's postseason has grown from one bowl game in the early 1900s into a system that attracts more than 1.5 million fans each year—more than the Super Bowl, World Series, NBA Finals, and NHL Stanley Cup combined.[77] This growth has occurred without the existence of an NCAA postseason playoff. The basketball postseason is equally as popular, but is a different story.

III. THE COLLEGE BASKETBALL POSTSEASON

The roots of the college basketball postseason trace back to the year 1938 in New York City when the Metropolitan Intercollegiate Basketball Association ("MIBA"), a group of New York City schools comprised of Fordham University, Manhattan College, New York University, St. John's University, and Wagner College, hosted the first National Invitational Tournament ("NIT").[78] One year later, the NCAA held its first national championship tournament.[79] In the years that followed, the NCAA implemented many changes to the rules governing its member schools and their basketball programs.[80] The effect of these changes was to funnel talented teams away from the NIT and into the NCAA tournament, thus allowing the NCAA tournament to grow in popularity and cementing the NCAA's control over the college basketball postseason.[81]

The first rule change occurred in 1953 with the passage of an NCAA rule prohibiting teams from playing in more than one postseason basketball tournament. Teams were forced to choose the NIT or the NCAA tournament, as they could no longer compete in both.[82] In 1961, the NCAA passed the

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73. Future BCS Structure, *supra* note 61.

74. *Id.*

75. Associated Press, *Fox Will Get Rights for Four Years*, ESPN.COM, Nov. 22, 2004, http://sports.espn.go.com/ncf/news/story?id=1929158.

76. *Id.* ABC had paid $305 million for the last four years. *Id.*

77. Fox Statement, *supra* note 48.

78. *MIBA I*, 337 F. Supp. 2d 563, 566 (S.D.N.Y. 2004).

79. *Id.*

80. *Id.* NCAA rules are published in the NCAA manual each year and every year all member schools must comply with rule changes or face fines and/or sanctions. *Id.* at 567.

81. *See generally* Maxcy, *supra* note 30, at 33 n.10 (noting the NCAA's expansion of the tournament field as a factor in the NIT's loss of popularity); *see also MIBA I*, 337 F. Supp. 2d at 566-67 (detailing the rise in popularity of the NCAA tournament and the decline in popularity of the NIT).

82. *MIBA I*, 337 F. Supp. 2d at 567.

"Expected Participation" rule which stated that teams invited to the NCAA tournament were expected to participate in the NCAA tournament.[83] The "expected" language in the rule did not prove very effective as one team in 1961, and five teams in 1962, chose to accept invitations to the NIT over invites to the NCAA tournament.[84] Further, in 1970, one of the top-ranked men's basketball teams in the country, Marquette University, elected to play in the NIT tournament despite a bid from the NCAA tournament.[85]

The NCAA continued to expand the number of teams in its tournament while also making rule changes that allowed multiple teams from a single conference to participate in the NCAA tournament, something that was previously prohibited.[86] The MIBA has argued that minutes from NCAA meetings during the 1940s, 1950s, and 1960s demonstrate that the NCAA's motive in making these changes was to disadvantage the NIT.[87] The NCAA maintains that the decisions were made strictly for business reasons and that the minutes on which the MIBA relies were taken out of context.[88] Regardless of the motivations, the NCAA tournament expanded considerably from 1950 to 1980, and the NCAA has maintained control over the college basketball postseason.

The most significant NCAA rule change came in 1981 when the "Commitment to Participate Rule" was passed. This rule stated that any team invited to participate in an NCAA postseason tournament was required to participate in the NCAA tournament or forego postseason competition all together.[89] Failure to comply with the Commitment to Participate Rule was considered a "major" NCAA violation.[90] As the court in *MIBA I* stated, "[t]his ended any uncertainty about a team's obligation to participate in the NCAA [basketball] championship if invited."[91]

The Commitment to Participate Rule stood unchallenged for nearly twenty years until, in 2001, the MIBA filed suit against the NCAA challenging the rule.[92] No team ever violated, or asked to be exempt from, the Commitment to Participate Rule while the rule was in effect.[93] In 2000, the NCAA Antitrust Subcommittee recommended to the NCAA Division I Management Council that

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83. *Id.*

84. *Id.* The teams were Loyola University (Chicago), Mississippi State, the University of Houston, St. John's University, and Dayton University (Dayton chose the NIT in 1961 and 1962). *Id.*

85. *Id.* at 566-67.

86. In 1951, the tournament was expanded to sixteen teams, then to twenty-two in 1953, then forty in 1979, forty-eight in 1980, fifty-two in 1982, fifty-three in 1984, sixty-four in 1985 and to its current level of sixty-five in 2001. *Id.* at 566-68.

87. *Id.* at 566.

88. *Id.* at 566-67.

89. *Id.* at 567.

90. *Id.*

91. *Id.*

92. *Id.* at 568.

93. *Id.* at 567.

the Commitment to Participate Rule be abandoned.[94] The Council never voted on a rule change, as several conference commissioners were worried that some teams might choose not to play in the NCAA tournament if the rule was changed.[95] The 2001 lawsuit was ultimately settled with the NCAA purchasing the NIT for $40.5 million along with a payment of $16 million in damages.[96]

Based on the NCAA's ability to control the men's college basketball postseason, the NCAA tournament has become a commercial success. The contract for television rights to air the tournament, an eleven-year $6 billion deal with CBS, accounts for virtually all of the NCAA's operating revenue.[97] The money made from the tournament is divided among conferences based on a six-year rolling average of the number of games that each conference has a team playing in during the tournament.[98] For example, if a conference has placed one team in the tournament each of the last six years and that team has played only one game in the tournament then that conference will receive six units of the current year's revenue from the tournament.[99] A basketball unit was worth $176,864 in 2005-06 and the NCAA paid out approximately $132.6 million in 2005-06 to conferences.[100] Antitrust law and challenges to NCAA rules help explain why the NCAA was able to maintain control and grow the college basketball postseason, yet was unable to have any meaningful presence in the college football postseason.

IV. ANTITRUST LAW AND THE NCAA

To understand why the NCAA would be unable to organize a college football playoff, it is necessary to understand the manner in which courts have applied antitrust laws to the NCAA. The courts' application of antitrust laws also reveal why the NCAA lost control of the college football postseason, yet was able to maintain control of the college basketball postseason.

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94. *Id.* at 567-68.

95. *Id.* at 568.

96. Brown, *supra* note 14.

97. According to the NCAA, the television deal will average about $545 million a year. Press Release, Wallace I. Renfro, Director of Public Relations, NCAA, NCAA Reaches Agreement with CBS (Nov. 18, 1999) (on file with author) [hereinafter Renfro Press Release]. The NCAA's operating revenue for 2005-06 was $521,100,000, of which 90% was attributed to television and marketing rights and fees. National Collegiate Athletic Association, NCAA Revised Budget Fiscal Year Ending August 31, 2005, http://www1.ncaa.org/finance/2005-06_budget.pdf.

98. *See* National Collegiate Athletic Association, Distribution of Basketball-Related Moneys According to Number of Units by Conference, 1999-2004, http://www.ncaa.org (follow "About the NCAA" hyperlink; then follow "Budget and Finances" hyperlink; then follow "Revenue Distribution and Forms" hyperlink; then follow "2006 Basketball Revenue Distribution" hyperlink) (last visited Jan. 17, 2007).

99. *Id.*

100. *Id.*

A. Overview

In the United States the Sherman Act[101] has been the typical vehicle of choice to attack an NCAA rule.[102] Section 1 of the Sherman Act provides "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."[103]

In applying the Sherman Act, courts examine agreements between two or more entities[104] to determine if the agreement is an unreasonable restraint of trade.[105] Certain types of restraints have been found by the courts to be "so inherently anticompetitive that they are *per se* invalid" under section 1 of the Sherman Act.[106] Restraints such as price fixing,[107] market divisions,[108] tying arrangements,[109] and group boycotts[110] have all been held invalid as per se violations of the Sherman Act.[111] In the case of the NCAA, however, agreements

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101. 15 U.S.C. §§ 1-7 (2000).

102. Violations of the Sherman Act were alleged in *NCAA v. Board of Regents of the University of Oklahoma (Bd. of Regents)*, 468 U.S. 85 (1984), *MIBA I*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004), and several other cases.

103. 15 U.S.C. § 1 (2000).

104. *MIBA I*, 337 F. Supp. 2d at 569-70. "[Section 1 of the Sherman Act] is directed only at joint action and 'does not prohibit independent business actions and decisions.'" *Id.* at 570 (quoting Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 70 (2d Cir. 1988). This is important because the NCAA has attempted to raise the defense that it is a single actor and therefore not subject to Sherman Act Section 1 scrutiny, this argument was rejected in *MIBA I*. *Id.*

105. *Id.*

106. *Id.*

107. *See generally* BAUMOL & BLINDER, *supra* note 37, at 239 (noting that price fixing is defined as collusion among competitors in which they agree on pricing policies).

108. *See generally* ROBERT W. EMERSON, BUSINESS LAW 488 (4th ed. 2004) (explaining that market divisions or horizontal territorial limitations occur when competitors divide up and keep exclusive geographical areas for the sale of their products).

109. *See generally id.* (noting tying arrangements involve requiring the purchase of a "tied" product in return for a contract involving a more highly desirable "tying" product). For example Microsoft has been accused of "tying" its Internet Explorer web browser with its Windows operating system. *See* Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1204 (D.C. Cir. 2004).

110. *See generally* Clarett v. National Football League, 306 F. Supp. 2d 379, 390 n.70 (S.D.N.Y. 2004) (explaining that group boycotts "generally consist of agreements by two or more persons not to do business with other individuals, or to do business with them only on specified terms"). In *Clarett*, an accomplished Ohio State University football player challenged an NFL rule restricting NFL draft eligibility to players who were three football playing seasons removed from high-school graduation. *Id.* at 382. At the district court, the player successfully argued the rule was a group boycott and a violation of the Sherman Act. *Id.* However, the court of appeals overruled the district court, holding that the rule fell within an exemption to antitrust review. Clarett v. National Football League, 369 F.3d 124, 140 (2d Cir. 2004).

111. *MIBA I*, 337 F. Supp. at 570.

that appear to be per se violations are nonetheless not struck down due to the unique nature of the NCAA.[112] Instead, NCAA rules are typically subjected to the "Rule of Reason" analysis.[113]

The Rule of Reason analysis looks to the actual effects of a rule or restraint on the market and the rule or restraint's pro-competitive justifications.[114] The Rule of Reason analysis is a three-step burden-shifting analysis.[115] Initially, the plaintiff must show that "the challenged action has had an actual adverse effect on competition as a whole in the relevant market."[116] If the plaintiff carries that burden, the defendant must then establish the pro-competitive "redeeming virtues" of the action.[117] If the defendant is able to do so, then "the plaintiff must show that the same procompetitive effect could be achieved through a method that is less restrictive on competition."[118] In the end, the goal is to determine whether the rule or restraint is potentially harmful to consumers.[119]

The plaintiff can be relieved of its initial burden if the anticompetitive effects of the restraint are obvious and "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[120] This is known as a "quick look" analysis and has been employed by the courts to examine some NCAA rules.[121] It appears that the benefit to a plaintiff of a "quick look" analysis is that the plaintiff will not have to engage in complex factual proofs of actual adverse effects on competition and defining the relevant market.

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112. *Id.* at 570-71 (citing NCAA v. Bd. of Regents of the Univ. of Okla. (*Bd. of Regents*), 468 U.S. 85, 102 (1984)) (discussing the fact that sport activities can only be carried on jointly and that certain NCAA restraints are necessary for college sports to exist at all).

113. *Id.* at 571.

114. *Id.* at 572.

115. *Id.* at 571.

116. *Id.* (citing K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995)).

117. *Id.*

118. *Id.*

119. *Id.* (citing Virgin Atl. Airways Ltd. v. British Airways PLC, 69 F. Supp. 2d 571, 582 (S.D.N.Y. 1999)).

120. *Id.* at 572 (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999)).

121. *Id.* In *Board of Regents*, the Supreme Court found a restriction on the price and output of televised football games to be suited for a "quick look" analysis. NCAA v. Bd. of Regents of the Univ. of Okla. (*Bd. of Regents*), 468 U.S. 85, 110 (1984). In *Law v. NCAA*, 134 F. 3d 1010, 1020 (10th Cir. 1998), the court applied a "quick look" analysis to an NCAA rule that capped certain coach's salaries. In other cases the courts have declined to apply a "quick look" analysis. For example, in *Worldwide Basketball and Sport Tours, Inc. v. NCAA* (*Worldwide Basketball II*), 388 F.3d 955, 961 (6th Cir. 2004), the court chose not to apply a "quick look" analysis to an NCAA rule that restricted the number of "exempt contests," games not counting towards a team's total number of regular season games, that a team could play in during a given time period. Also, in *MIBA I*, 337 F. Supp. 2d at 573, the court refused to apply a "quick look" analysis to the NCAA's "Commitment to Participate" rule.

The Supreme Court's jurisprudence in Rule of Reason analysis has been shaped by two relevant cases: *Board of Trade v. United States*[122] and *National Society of Professional Engineers v. United States*.[123]

B. Relevant Cases

1. Board of Trade v. United States.—The initial formulation of the Rule of Reason analysis was laid out by the Supreme Court in *Board of Trade*.[124] The case involved members of the grain industry in Chicago who agreed that the price of grain would only be negotiated between the hours of 9:30 a.m. and 1:15 p.m. (or while the exchange was open) and that after the exchange closed the price of grain would remain fixed until the exchange opened the next morning.[125] Even though the rule restrained trade by fixing the price of grain while the exchange was closed, the Court allowed the rule because the defendants could justify it based on the small amount of grain traded while the price was fixed and the fact the rule may also improve market conditions by bringing buyers and sellers together.[126] Justice Brandeis articulated, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[127] This was the initial rule of reason test and did not require the defendant to show pro-competitive benefits of the restraint, only to justify it.[128] It has been argued that this early formulation of the rule was much less burdensome on the defendant and that the current test has increased the burden on the defendant.[129]

2. National Society of Professional Engineers v. United States.—The "Rule of Reason" analysis evolved further in *Professional Engineers*[130] and now required the defendant to show pro-competitive benefits. This is important because this shows the difficulty an organization could face if they fail to offer pro-competitive benefits when a rule is challenged. *Professional Engineers* involved engineers who agreed, through a code of ethics, not to discuss price with customers when soliciting bids.[131] According to the engineers, discussing price would destroy the industry's traditional method of selecting an engineer

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122. 246 U.S. 231 (1918).

123. 435 U.S. 679 (1978).

124. *Bd. of Trade*, 246 U.S. at 231.

125. *Id.* at 236-37.

126. *Id.* at 239-41.

127. *Id.* at 238.

128. Michael B. LiCalsi, Casenote, *"The Whole Situation Is a Shame, Baby!" NCAA Self-Regulations Categorized As Horizontal Combinations Under the Sherman Act's Rule of Reason Standard: Unreasonable Restraints of Trade or an Unfair Judicial Test?*, 12 GEO. MASON L. REV. 831, 857-58 (2004).

129. *See id.* at 858-59.

130. 435 U.S. 679 (1978).

131. *Id.* at 682-83.

and possibly endanger the public because competition based on price could lead to a decrease in the quality of engineering.[132] The Court noted that there are:

> [T]wo complementary categories of antitrust analysis. . . . agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are illegal *per se*. . . . [and] agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why [the restraint] was imposed.[133]

The Court found that the agreement to not discuss price did not require elaborate industry analysis to demonstrate its anticompetitive character and held the agreement, on its face, to be a violation of the Sherman Act.[134] It has been argued that this version of the analysis places a greater burden on the defendant to not only justify the restraint but to also prove its pro-competitive benefits.[135]

3. NCAA v. Board of Regents of the University of Oklahoma.—The case of *NCAA v. Board of Regents of the University of Oklahoma*[136] represents a crucial development in the shift of power from the NCAA to member schools in the realm of college football. It empowered conferences, free from NCAA controls, to negotiate for the sale of television rights and thus in the future enter into agreements to sell television rights to postseason bowl games.[137] The case also shows how a court might apply antitrust laws to the NCAA in the future. In *Board of Regents*, a group of NCAA member schools entered into a contract with NBC to broadcast football games despite an NCAA agreement with ABC and CBS.[138] The NCAA threatened disciplinary action and sanctions against any team that honored the NBC contract.[139] The Supreme Court first noted that the NCAA rule was a horizontal restraint of trade that amounted to price fixing and would ordinarily be struck down as a per se violation of the Sherman Act.[140] However, the Court declined to strike the rule down as a per se violation because the industry of college sports required horizontal restraints in order to exist.[141] Instead, the Court applied a Rule of Reason analysis in rejecting the NCAA's

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132. *Id.* at 684-85.

133. *Id.* at 692.

134. *Id.* at 692-93.

135. *See* LiCalsi, *supra* note 128, at 859.

136. 468 U.S. 85 (1984).

137. *See* Fizel & Bennett, *supra* note 18, at 332.

138. *Id.* at 94-95. The NCAA had a television plan that gave ABC and CBS the right to broadcast college football games and negotiate with schools to air games. *Id.* at 92. However ABC and CBS agreed to schedule appearances for eighty-two schools over a two-year period and no one school could appear nationally more than four times in the same period. *Id.* at 94.

139. *Id.* at 95.

140. *Id.* at 99-100.

141. *Id.* at 100-01.

alleged pro-competitive benefits[142] and found that college football could be marketed just as effectively without the NCAA plan.[143] This decision is important because now college football teams can sell the rights to televise their games and take control of television revenues generated from football.[144] Ultimately, this is what prevents the NCAA from interfering with individual schools entering into postseason agreements to have their bowl games televised. In comparison, the right to televise the NCAA men's college basketball tournament has always been, and remains, with the NCAA.[145]

4. Worldwide Basketball & Sport Tours, Inc. v. NCAA.—An NCAA rule relating to basketball was successfully defeated in *Worldwide Basketball & Sport Tours, Inc. v. NCAA*;[146] however, the case was overruled on appeal.[147] The challenged rule was NCAA bylaw 17.5.5.4, or the "Two in Four Rule."[148] The Two in Four Rule limited the number of "certified events" in which a basketball team could play during a given time period.[149] The rule allowed a team to play in only one certified event a year and no more than two certified events in a four-year time span.[150] It was argued that the rule decreased the output of college basketball games by lowering the number of "certified events" played while the rule was in effect.[151] The district court applied a "quick look" analysis (relieving the plaintiff of its initial burden) and found a violation of the Sherman Act; however, the court of appeals held that a quick look analysis was inappropriate and reversed based on the plaintiff's failure to establish the relevant market.[152] This case shows the courts' reluctance to apply a quick look analysis to NCAA rules.

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142. *Id.* at 113. The NCAA argued that the plan was a sort of joint venture that assisted in the marketing of television rights. *Id.* The Court also noted that there could be no procompetitive efficiencies because the effect of the plan was to raise prices by restricting outputs and competition would have the opposite effect, prices would decrease and output would increase. *Id.* at 114.

143. *Id.*

144. Maxcy, *supra* note 30, at 22.

145. *See* Renfro Press Release, *supra* note 97. The NCAA chooses to sell this right. *Id.*

146. Worldwide Basketball & Sport Tours, Inc. v. NCAA (*Worldwide Basketball I*), 273 F. Supp. 2d 933, 954-55 (S.D. Ohio 2003).

147. *Worldwide Basketball II*, 388 F.3d 955, 963-64 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 334 (2005).

148. *Id.* at 957.

149. *Id.* "Certified events" are basketball tournaments in which teams play between one and six games; however, those games count as only one game toward a team's total number of games allowed in a season (twenty-eight at the time of the suit). *Id.* "Certified" or "exempt" events typically take place before the season or during a vacation break. *Id. Worldwide Basketball I*, 273 F. Supp. 2d at 937.

150. *Worldwide Basketball II*, 388 F.3d at 957.

151. *Worldwide Basketball I*, 273 F. Supp. 2d at 938.

152. *Worldwide Basketball II*, 388 F.3d at 961.

5. Metropolitan Intercollegiate Basketball Ass'n v. NCAA *("*The NIT Case*").*--In *The NIT Case*,[153] the organizers of the NIT sued the NCAA in 2001 over several current NCAA rules that they alleged violated the Sherman Antitrust Act.[154] The thrust of the plaintiff's argument was that the Commitment to Participate Rule, along with the other rules, was a violation of the Sherman Act in that the rules operated to prevent the NIT from competing with the NCAA tournament to attract a competitive field of teams.[155] The district court held that the Commitment to Participate Rule was an agreement among NCAA members and therefore subject to Sherman Act scrutiny.[156] Also, a per se analysis was not appropriate under *Board of Regents* and a full burden shifting "Rule of Reason" analysis would be applied, as opposed to the "quick look" analysis.[157]

The court also found that the plaintiff had made a sufficient showing that it could prove at trial that the relevant market was Division I men's college basketball postseason tournaments and that the NCAA earns monopoly profits and has the power to exclude.[158] The court also noted that the Commitment to Participate Rule potentially adversely affected competition by depriving colleges and fans of a potentially attractive postseason tournament choice and the possibility of participation in an additional tournament; however, it was left for trial to determine if the plaintiff could prove anticompetitive effects or if NCAA could prove pro-competitive justifications under the Rule of Reason analysis.[159] During trial the parties settled for $16 million and the NCAA purchased the NIT for $40.5 million.[160] Some argue that the purchase will create a monopoly and should not be allowed to stand; however, thus far neither the Federal Trade Commission nor the Department of Justice have taken any action.[161]

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153. *MIBA I*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004); *MIBA II*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

154. *MIBA I*, 337 F. Supp. 2d at 568. The challenged rules were the "End of Playing Season" rule which prevented any games from being played after the NCAA tournament's final game; the "One Postseason Tournament Rule" which prohibited a team from playing in both the NIT and the NCAA tournament; the "Commitment to Participate Rule" which required a team invited to the NCAA tournament to participate in the NCAA tournament or no tournament at all; the automatic qualification of conference champions for the NCAA tournament; and the NCAA's expansion of its tournament's playing field. *Id.*

155. *Id.*

156. *Id.* at 570. The NCAA's single actor argument was rejected. *Id.*

157. *Id.* at 573.

158. *MIBA II*, 339 F. Supp. 2d at 550. This was the area where the plaintiffs in *Worldwide Basketball* failed. *Worldwide Basketball II*, 388 F.3d 955, 961 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 334 (2005).

159. *MIBA II*, 339 F. Supp. 2d at 551-52.

160. Brown, *supra* note 14.

161. Letter from Diana Moss, Vice-President and Senior Fellow of the American Antitrust Institute, to Thomas Barnett, Assistant Atty. Gen. for Antitrust, U.S. Dept. of Justice, Deborah Majoras, Chairman, Fed. Trade Comm., & Elliott Spitzer, Atty. Gen. State of N.Y. (Sept. 12, 2005), *available at* http://www.antitrustinstitute.org/recent2/445.pdf.

C. Antitrust Challenges to the BCS

This Note does not argue whether or not the BCS violates the Sherman Act. There have been no legal challenges to the BCS to date; therefore, it will be presumed that the BCS passes Sherman Antitrust scrutiny under the *Board of Regents* "Rule of Reason" analysis as having pro-competitive benefits.[162]

V. THE NCAA'S DOMINANCE OF THE COLLEGE BASKETBALL POSTSEASON AND LACK THEREOF IN THE COLLEGE FOOTBALL POSTSEASON

A. Why Are the Two Postseasons So Different?

To understand why the NCAA will never be able to control the college football postseason in the same way that it currently controls the college basketball postseason it is important to look at how the two postseasons arrived at their current positions. As mentioned above, the NCAA used a series of rule changes to grow their basketball tournament and maintain control over the college basketball postseason. The most recent example of the NCAA exercising power over universities to maintain control over the basketball postseason was highlighted in *The NIT Case*[163] in which the owners of the NIT sued the NCAA over the NCAA Commitment to Participate Rule. The district court in *The NIT Case* opined that the NCAA rule might be a violation of the Sherman Antitrust Act,[164] but the case was settled during trial when the NCAA bought the NIT.[165] This eliminated any competition to the NCAA postseason tournament. In the wake of the NCAA's purchase of the NIT, two very different postseason environments are left in college basketball and in college football. The postseason in college basketball is controlled exclusively by the NCAA in a tournament format, while the postseason in college football is controlled exclusively by the BCS through agreements between conferences, bowl game organizers and television networks, leaving out the NCAA.

College football and college basketball are strikingly similar in structure and

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162. Several law review articles take up this topic. They are essentially split on whether the BCS could survive an antitrust challenge. *See* Jasen R. Corns, Comment, *Pigskin Paydirt: The Thriving of College Football's Bowl Championship Series in the Face of Antitrust Law*, 39 TULSA L. REV. 167 (2003) (argues that litigation is unlikely but that the BCS violates antitrust law); Katherine McClelland, Comment, *Should College Football's Currency Read "In BCS We Trust" or Is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH L. REV. 167 (2004) (arguing the BCS violates the Sherman Act); Warmbrod, *supra*, note 4, at 333 (arguing an antitrust challenge to the BCS would be unsuccessful); M. Todd Carroll, Note, *No Penalty on the Play: Why the Bowl Championship Series Stays In-bounds of the Sherman Act*, 61 WASH. & LEE L. REV. 1235 (2004) (arguing no antitrust violation).

163. *MIBA I*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004); *MIBA II*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

164. *MIBA II*, 339 F. Supp. 2d at 551-52.

165. Brown, *supra* note 14.

nature,[166] but the postseason structures of the two sports are dramatically different. Why is this the case, and how did the two sports arrive at such different outcomes? Football is not inherently incapable of being played in a postseason tournament. The National Football League holds one every year,[167] and college conference structures vary only slightly between football and basketball.[168] One possible answer is in the evolution of the postseason structures and with whom the power to control those structures was originally vested.

When basketball postseason play first started, it was organized by the MIBA in the form of the NIT tournament, not the NCAA.[169] The NCAA acted quickly and organized a tournament.[170] Next, the NCAA enacted rules to promote the success of their own tournament. These rules were rarely challenged, and only recently did the MIBA, the organizers of the NIT, mount a full-scale legal challenge to the NCAA's competition restricting rules.[171] However, this challenge came too late. The NIT tournament was minuscule in comparison to the NCAA tournament,[172] and the NCAA quickly solved its legal troubles by purchasing the NIT.[173]

In contrast, the football postseason was originally organized by bowl promoters through agreements with conferences to send conference champions to particular bowl games.[174] The NCAA did not attempt to interfere with these agreements. Further, when the NCAA attempted to restrict individual schools from entering into television contracts for their football games, the schools challenged the NCAA and won control of the right to enter into broadcast

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166. Both sports are organized into conferences and governed by similar NCAA rules in regards to amateurism, scholarships, and academic requirements. *See* National Collegiate Athletic Association, NCAA Sport Listing, http://web1.ncaa.org/ssLists/sportByConf.do (last visited Mar. 6, 2006). Rules regarding amateurism and academic requirements are the same across all sports and scholarships vary only by number based on the number of athletes required per sport. NCAA MEMBERSHIP SERVICES STAFF, 2005-06 NCAA DIVISION I MANUAL, Articles XII, XIV, and XV, July 2005.

167. National Football League, Playoff History, http://www.superbowl.com/history (last visited Nov. 21, 2006).

168. *Compare* National Collegiate Athletic Association, Sport Listing by Conference (Football), http://web1.ncaa.org/ssLists/sportByConf.do?sport=MFB&division=1 (last visited Nov. 21, 2006), *with* National Collegiate Athletic Association, Sport Listing by Conference (Basketball), http://web1.ncaa.org/ssLists/sportByConf.do?sport=MBB&division=1 (last visited Nov. 21, 2006).

169. *MIBA I*, 337 F. Supp. 2d 563, 566 (S.D.N.Y. 2004).

170. *Id.*

171. *See generally id.* at 563 (discussing the recent legal challenge to NCAA rule changes).

172. *Marketplace: The NCAA and the NIT* (National Public Radio broadcast Aug. 18, 2005) *available at* http://marketplace.publicradio.org/shows/2005/08/18/PM200508183.html. The NIT's net revenue in 2004 was approximately one million dollars while the NCAA tournament's TV rights alone are sold to CBS on an eleven-year $6.2 billion contract. *Id.*

173. *See* Brown, *supra* note 14.

174. Johnstone Statement, *supra* note 46.

contracts for football games.[175] These factors allowed the football postseason bowl games to grow without unfair NCAA interference.

Today these agreements between conferences, bowl organizers, and television networks are so strong and lucrative that the NCAA is not in a position to establish a postseason playoff because doing so would require either the use of unfair restrictions to force teams to play in the NCAA tournament (which would likely be illegal based on the reasoning of *The NIT Case*) or buying out the bowl games (which is unlikely because the BCS is in a stronger financial position than the MIBA was).

B. No Football Team Would Agree to a Playoff; Therefore, an NCAA Rule Would Be Necessary

Based on the NCAA's treatment of revenue sharing in the postseason basketball tournament, teams participating in a football playoff would likely have to divide any revenue produced by a football playoff among all NCAA schools.[176] This would make schools that excel in college football unlikely to agree to a playoff because they would have to share money that they currently keep under the BCS. Additionally, college football teams of a lower caliber would be unlikely to agree to a playoff because a playoff would decrease the number of postseason play options and thereby reduce the number of postseason payouts.[177] The revenue from a playoff could result in a larger pie, but the pie would have to be split among a larger number of teams, and thus, teams would have to agree to a smaller piece of a larger pie.[178]

The NIT Case revealed the NCAA's unwillingness to tolerate any competition in the basketball tournament. The history leading up to the case showed how the NCAA was unwilling to lose control over the basketball postseason.[179] In fact, the NCAA was willing to take steps to eliminate any competition.[180] As the NCAA currently lacks control over the college football postseason, college football programs should look at *The NIT Case* and realize that if they agree to a playoff system, they will cede control to the NCAA that the NCAA will not give back.[181]

Since college football teams are not likely to voluntarily agree to an NCAA

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175. *See generally* NCAA v. Bd. of Regents of the Univ. of Okla. (*Bd. of Regents*), 468 U.S. 85 (1984).

176. Maxcy, *supra* note 30, at 13. If there were a sixteen-team playoff, then only thirty-two teams would share in the money versus the current bowl system where there are twenty-eight games resulting in payouts to fifty-six teams.

177. Currently there are thirty-two bowl games involving sixty-four teams. Football Bowl Association, *supra* note 48. A sixteen-game playoff would reduce the number of participating teams to thirty-two.

178. Maxcy, *supra* note 30, at 26.

179. *See generally MIBA I*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004); discussion, *supra* Part III.

180. Maxcy, *supra* note 30, at 33 n.10.

181. *Id.* at 26.

playoff, the only way the NCAA could put together a playoff system would be through use of the Commitment to Participate Rule in a manner similar to its challenged use in *The NIT Case*.[182] Granted *The NIT Case* is not law, but it shows the analysis that a court would go through if the NCAA instituted measures to take control of the college football postseason. An attempt by the NCAA to do so would produce anticompetitive effects that would be much more obvious than the subtle measures used to maintain power over postseason basketball. The NCAA's hold over the college basketball postseason was gradual and played out over time, whereas any attempt by the NCAA to take control of the college football postseason now would have to be drastic given the BCS's stature.

C. The Situation Will Not Change

The bowl system creates a set of postseason play options; college football teams currently have thirty-two choices.[183] However, choices are limited somewhat by the BCS because the BCS is really just the bowls collectively deciding who they want to invite. The BCS acts as a central coordinator in a distributive function and attempts to place highly ranked teams against other highly ranked teams.[184] A team can turn down a BCS bowl bid because acceptance is not mandatory, but no team has ever done so.[185] This choice is influenced by the pay out and reputation of the bowl. If the system works and teams are rational, then each team will go to the bowl game that will maximize exposure and revenue.

"The relationship between the power football conferences and the bowl

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182. *MIBA I*, 337 F. Supp. 2d at 549; *see also* Maxcy, *supra* note 30, at 23, 33 n.10 (noting the tactics used by the NCAA to maintain control over the college basketball postseason and commenting that an independent football playoff would be at a considerable disadvantage in competing with the NCAA because of the NCAA's treatment of the NIT).

183. Football Bowl Association, supra note 48.

184. Weiberg Statement, supra note 59. "[The BCS] has always had relatively simple objectives . . . to match the number one and number two ranked teams . . . [and provide] a means by which other highly regarded teams can be matched together to create quality bowl match-ups." *Id.*

185. It would be irrational for a team to turn down a BCS bowl bid given the $14 to $15 million payout. Revenue Distribution, *supra* note 65. Other bowls average a significantly lower payout, between $750,000 and $5.125 million. Humanitarian Bowl, Inc. I.R.S. Form 990 (tax year beginning Mar. 1, 2003 and ending Feb. 29, 2004) at 11 (on file with author); Florida Citrus Sports Assoc, Inc. I.R.S. Form 990 (tax year beginning Apr. 1, 2003 and ending Mar. 31, 2004) at 17 (on file with author). Teams can also accept a bid to a bowl game early, even if that team's conference has an automatic bid to a different bowl game. For example, during the 2005 season Ohio State finished second in the Big Ten conference, through a "tie-in" arrangement the second place Big Ten team usually attends the Capital One Bowl. However, Ohio State chose to accept an at-large bid from the Fiesta Bowl. History of the BCS, *supra* note 6.

organizers provides the main obstruction to an NCAA playoff."[186] If an NCAA playoff were instituted it would compete with the bowl games.[187] Teams would not necessarily have a choice as to where they would play in the postseason because the Commitment to Participate rule is still on the NCAA books;[188] this would give the NCAA a considerable advantage.[189] However it is unlikely use of the rule in the football context would survive antitrust challenges based on the analysis of *The NIT Case*.

What would happen if the Rose Bowl (the largest bowl game) did not go along with an NCAA playoff system and instead chose to invite teams and pay them $13 million to play in the game?[190] It is unlikely that a team would pass up the money of a BCS game to go to an NCAA playoff. This is exactly what stood to happen in college basketball if the MIBA could have maintained their lawsuit. The NIT could possibly have paid more through less restrictive corporate sponsorship rules[191] which would have resulted in more tournament revenues to be paid out to participating teams. The NIT could have potentially lured teams away from the NCAA tournament in the same fashion that the BCS is able to control the postseason in college football. This shows that even if the NCAA instituted a playoff and the Commitment to Participate Rule were unchanged, it is still unlikely that a powerhouse college football program would choose to play in an NCAA tournament over a high-paying BCS bowl game.[192]

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186. Maxcy, *supra* note 30, at 23.

187. *Id.*

188. NCAA MEMBERSHIP SERVICES STAFF, 2005-06 NCAA DIVISION I MANUAL, art. 31.2.1.1, July 2005. At the time of submission of this Note a search of NCAA pending legislation revealed no pending legislation that would alter the "Commitment to Participate Rule." *See* http://www.ncaa.org (follow "Legislation and Governance" hyperlink; then follow "Rules and Bylaws" hyperlink; then under "Proposed Legislation" follow "Division I" hyperlink).

189. Maxcy, *supra* note 30, at 23.

190. This is what happened with the Bowl Coalition and Bowl Alliance. *See* discussion, *supra* Part II.

191. Currently the NCAA restricts the nature of advertising at the men's basketball championship. The championship cannot be sponsored by beer, liquor, wine, or tobacco companies; alcohol sales are not allowed; and beer and wine advertising is restricted to no more than fourteen percent of the advertising space in event programs and no more than sixty seconds in every hour during a television broadcast. NCAA MEMBERSHIP SERVICES STAFF, 2005-06 NCAA DIVISION I MANUAL, art. 31.1.14.1.1-2, 31.1.15, July 2005.

192. The NCAA could sanction any team that chooses to do so. However, that fine would have to be high enough to offset the payout offered by a BCS game (some $13 million). If the fines, were significant, some schools might seriously consider leaving the NCAA. *See* Steve Wieberg, *Option for Top Football Schools: Leave NCAA*, USA TODAY, Nov. 4, 2003, at 8C (discussing the option of top football schools leaving the NCAA) [hereinafter Wieberg, *Option for Top Football Schools*].

VI. POSSIBILITIES FOR THE FUTURE AND CONCLUSION

A. Possibilities for the Future

One option discussed at a recent congressional hearing was the "plus-one" format.[193] Under this format there would be one additional game, played after all other bowl games have been played, which would feature two teams that "advanced" from the first four bowl games.[194] The BCS could organize this or the NCAA could step up and make this game their national championship game.[195] As it now stands, university presidents are reluctant to add an additional game to the season so the plus-one format will most likely not be appearing anytime soon.[196]

A more drastic solution views the BCS as an alternative to the NCAA and calls for a breakaway from, or the formation of a new division within, the NCAA.[197] The NCAA's original purpose of standardizing rules seems to be fulfilled and its current usefulness is sometimes called into question.[198] The new division or the BCS could loosen restrictions on things like length of season and academic standards to allow for a greater focus on football.[199] This could allow for the organization of a playoff independent of the bowls, or the bowl games could be incorporated into an extended regular season with the playoff to follow. This would preserve the bowl games, add a playoff, and allow for a consensus national champion.

B. Conclusion

In the end, NCAA football programs should learn from the evolution of the

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193. Associated Press, *Congress Won't Legislate After BCS Hearings*, ESPN.COM, Dec. 7, 2005, http://sports.espn.go.com/ncf/news/story?id=2251585.

194. *Id.*

195. *Id.* The plus-one game is not the same as the fifth BCS game added this year. The current additional BCS game will feature two teams who have not already played in a bowl game that year, whereas the plus-one format game would feature two teams who have already played their respective bowl games. *Id.*

196. *Review of Selection Process for College Football Bowl Games: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Jim Delaney, Commissioner, Big Ten Conference).

197. *See generally* Wieberg, *The Runaway Train*, *supra* note 16 (discussing option of a new NCAA division); Wieberg, *Option for Top Football Schools*, *supra* note 192 (discussing teams leaving the NCAA). The NCAA's recent name change of Division I-A to "Football Bowl Subdivision" might appear to be a step in this direction; however, the change is merely a matter of semantics and there have been no changes in the rules. *See* Albright, *supra* note 1.

198. *See* Wieberg, *The Runaway Train*, *supra* note 16.

199. Granted this is totally converse to the ideal of a student-athlete, but with most football programs failing academically as it is, *see* Associated Press, *41 Percent of Bowl Teams Miss Academic Standards*, ESPN.COM, Dec. 5, 2005, http://sports.espn.go.com/ncf/bowls05/news/story?id=2248992, this ideal of a student-athlete may be fading into the past.

college basketball postseason and resist any attempt by the NCAA to institute a playoff. College football programs are currently maximizing their wealth through the bowl system and the successful schools and conferences are being rewarded for their success. The wealth created by that success is then in turn distributed within conferences, which promotes parity within conferences and motivates all teams to strive for bowl game bids and increase revenues.

Any maneuver by the NCAA to gain power in the college football postseason would likely require the use of the Commitment to Participate Rule or a similar rule. However *The NIT Case* has demonstrated that this type of behavior would likely fail under Sherman Act scrutiny. Unlike the NIT, which was somewhat easily purchased by the NCAA, the NCAA could not easily purchase the BCS to take control of the college football postseason and solve any potential antitrust litigation. Also, the BCS would not likely be willing to sell.

No matter how much fans and journalists cry out for an NCAA playoff, the NCAA is incapable of organizing a playoff given its current situation. Drastic changes in the landscape of college football, such as further NCAA reorganization or a split from the NCAA, are needed before a playoff can become a reality in the postseason of college football.